(29,038)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 488.

CHARLES L. CRAIG, PETITIONER,

vs.

WILLIAM C. HECHT, UNITED STATES MARSHAL FOR THE SOUTHERN DISTRICT OF NEW YORK.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

VOLUME II.

INDEX.

	Page.
Testimony of Charles L. Craig (continued)	621
Testimony of George T. Van Valkenburg (recalled)	724
Government Exhibit 1—Letter, Lewis Nixon to Charles L. Craig, October 1, 1919	731
Government Exhibit 2—Letter, Charles L. Craig to Lewis Nixon, October 6, 1919	733
Defendant's Exhibit A—Letter, Lewis Nixon to Charles L. Craig, October 3, 1919	737
T—Compendium of testimony taken in investigation of Interborough Metropolitan Co. *et al*	738
"U"—Compendium of grand jury investigation of Metropolitan Street Railway Co., January 24, 1908	775

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 12, 1923.

Page.

Defendant's Exhibit "V"—Compendium of communications received by board of estimate and apportionment, the comptroller, the mayor, and publications in the press of New York City *in re* contempt proceedings 783
W—Extracts from memorandum by Mayer, J..... 820
Exhibit F to Petition for Writ—Opinion, Mayer, J..... 821
Exhibit G to Petition for Writ—Order, Mayer, J..... 838
Exhibit H to Petition for Writ—Summary of testimony on the contempt trial (not set out)..... 840
Return to writ of *habeas corpus*..... 841
Exhibit I to Return—Order and letter designating places of confinement for prisoners..... 849
Exhibit II to Return—Sentence in contempt case..... 851
Traverse to return to writ of *habeas corpus*..... 852
Exhibit A to Traverse—Order appointing Manton, circuit judge, to hold district court..... 863
Statement of facts (continued)..... 869
Colloquy between court and counsel..... 870
Testimony of William Tallman..... 881
Petitioner's Exhibit No. 3—(Not set out)..... 887
Exhibit 3—Extract from New York Law Journal of February 25, 1921 888
Statement of facts (continued)..... 889
Statement of contents of certain Government exhibits..... 889
Government's Exhibit No. 26—Opinion, Mayer, J., *in re* report of Stone & Webster..... 917
Report of Stone & Webster, September 4, 1919..... 920
Government Exhibit No. 34—Bill of complaint in case of Westinghouse Electric and Mfg. Co. *vs.* Brooklyn Rapid Transit Co. *et al.* in D. C. U. S., southern district of New York..... 923
Government's Exhibit 35—Answer in above case..... 946
Government's Exhibit 36—Order appointing receiver in above case 951
Government's Exhibit 38—Notice and petition of Public Service Commission in above case..... 956
Government's Exhibit 40—Answer to petition of Public Service Commission in above case..... 991
Government's Exhibit 41—Affidavit of William P. Burr in case of Westinghouse Electric and Mfg. Co. *vs.* Brooklyn Rapid Transit Co. *et al*..... 1008
Exhibit A—Memorandum of department of finance of New York City *re* city's investment in rapid transit construction under contract No. 4, with statement of unpaid taxes..... 1033
Exhibit C—Statement of unpaid claims and judgments against the New York Municipal Railway Corporation *et al*..... 1047
Exhibit D—Resolution of board of estimate and apportionment directing the corporation counsel to move appointment..... 1060

Page.

Government's Exhibit 42—Opinion, Mayer, J., making receivership permanent and denying motion for a coreceivership..... 1052
Government's Exhibit 43—Notice and order continuing receivership during pendency of suit..... 1066
Government's Exhibit 46—Application of receiver for leave to employ certified public accountants..... 1075
Government's Exhibit 51—Order authorizing receiver to employ certified public accountants..... 1081
Government's Exhibit 100—Bill of complaint in case of American Brake & Shoe Foundry Co. *vs.* New York Railway Company 1086
Government's Exhibit 110—Answer in same case..... 1101
Government's Exhibit 111—Order appointing temporary receiver in same case..... 1105
Government's Exhibit 113—Stenographer's minutes in same case on return of order to show cause why receivership should not be continued..... 1110
Order settling statement of facts..... 1128
Clerk's certificate..... 1129
Proceeding in U. S. circuit court of appeals..... 1130
Order of substitution..... 1130
Opinion, Rogers, J..... 1131
Concurring opinion, Hough, J..... 1162
Dissenting opinion, Hand, J..... 1167
Judgment 1179
Order to show cause why judgment should not be resettled and amended. 1181
Affidavit of Edmund L. Mooney..... 1183
Proposed form of order resettling judgment..... 1186
Order approving proposed form..... 1192
Affidavit of David V. Cahill answering affidavit on motion to settle.... 1193
Order resettling and amending judgment..... 1197
Clerk's certificate..... 1198
Writ of certiorari and return..... 1199

1861

Mr. Mooney: Of course, that is a conclusion. These things are all susceptible of proof. I don't know just where we will end.

The Court: That is a very broad question.

Mr. Mooney: Of course, it is, sir, but I have got to the point where I think my learned friends will do me the justice, and your Honor may certainly rest, dependent upon the fact that I am not going to offer anything that I haven't got the best evidence for. The only thing is that we spit 1862
it out. I will follow it up by the letters to and from the receiver. I will follow it up by the attempt made of the investigation to get at it. I will follow it up by the futility, all of which was known to the—

The Court: Referring now to what?

Mr. Mooney: To the very prototype of this situation under the administration of Judge Lacombe, and unless your Honor is a mightier judge that Judge Lacombe was, you will find that his directions, which were along the lines that you followed, were 1863
flouted and set at naught by the receivers, just in exactly the same way as the Comptroller in his letter claimed.

The Court: I confess I do not see the materiality of that at all, and in the case at bar, there is thus far no evidence of any requests for information to the defendant or members of the Board of Estimate, so that it is an application for the appointment of a co-receiver. The witness states the clause relating to the denial of access, was

1864

in his mind, made up and largely concluded by the denial of the court to appoint a co-receiver. Now, whether under the administration of some other receivership, some books were obtained or not obtained is, to my mind, wholly immaterial, and whether the witness knew that or thought about it is wholly immaterial.

Mr. Mooney: Why, your Honor, if you were to follow that out, there would be no defense in any proceeding for contempt for

1865

the writing of a letter, because we would then be denying the experience and the knowledge of history, you cannot wipe out of your mind in the writing of a letter. You personally are conscious of these facts we are attempting to prove, by your knowledge of the history of this court, and for a person to say that a thing can transpire in this court, that it had almost an exact prototype, that the Judge did what you did, that his acts failed of effect, as the Comptroller in this case claims, that your

1866

Honor's act failed in effect, that is a matter of the actual history of not only of the law, but of the community.

The Court: This court does not propose to be confused in respect to the issues in the mind of the Court. They are extremely simple. The defendant in his letter stated that the court had adopted a policy in effect—I haven't the letter before me at the moment—of denying access to original sources of information. Now, he has stated thus far that what he had in mind, was that the action of the Court in denying the

1867

motion for a co-receiver led him inevitably to that result. Now, that was a perfectly understandable point of view, but whether it was in his mind that through some other receivership or in a series of matters which resulted one way or another and all that sort of thing, has nothing to do what ever with whether this Court adopted a policy of denying access to original sources of information.

Mr. Mooney: Your Honor, I did not want to interrupt you, but you have failed 1868
to summarize the co-relative statements of the defendant, which are, that it was not merely by denying the appointment of a co-receiver, but that it was by the continuation of a friendly receiver and by the employment by that friendly receiver of the same instruments, the same personnel, which had been in the care, which had had the care and custody of the books, papers, etc. It is this combination of elements, and if we prove now that the same combination of elements had existed in a prior case, that 1869
it seems to us would be a complete meeting of the point.

The Court: I think not. I am entirely agreeable to the witness's stating the names of any persons continued in the employ of the Receivers appointed by the Court who had been theretofore in the employ of the transit corporation to make a statement of what was in his mind, that to my point of view would be perfectly proper as a piece of evidence showing what his state of mind

1870

was, his impression from his point of view. That is entitled to consideration.

Mr. Mooney: Of course, I have no power or ability to run counter to the current that your Honor has announced. I fear, however, that we are getting into a very narrow point. I have already announced that the preparation for this hearing is so complete that the entire hearing upon the lines that I am conducting it is not going to take more than twenty-four hours, therefore, the public time

1871

need not be very seriously considered. If a contempt proceeding consists in putting a man upon the stand and just asking him substantially "did you write this letter, and did you have in mind at the instant thereof some matters of instant recollection, "without showing that he, a lawyer, and familiar with the very matters of which I am inquiring and had a familiarity with what had gone before, I think we are not going to get very far.

The Court: I do not care to hear any

1872

further discussion. I have ruled and you may have an exception.

Mr. Mooney: I do except. I am at a loss to know just which way to present the record, because you seem to have made up your mind very fully on the subject and I do not wish to get into any personal misunderstanding. Yet, it is my duty to present my case in the way I have and in the way I think it ought to be presented. I hope your Honor will not take offense at that. I am very serious to present it and I intend to present it to the best of my ability.

1873

Q. I will ask you whether this information contained on the sheets of paper was in your mind at the time that you wrote the letter, substantially, so that I may offer that? A. It was.

Mr. Mooney: Now, I offer these sheets of paper.

Mr. Caffey: Same objection. It is utterly immaterial, has nothing to do with this case.

The Court: Objection sustained.

Mr. Mooney: I except. Please mark them for identification, the four sheets as one number. 1874

Marked "Defendant's Exhibit 2 for identification.

Q. And was the source of your information as described in the paper which has been offered for identification, Defendant's Exhibit 2? A. It was.

Q. Now, Mr. Craig, when you wrote your letter did you know that one of these railroad companies had a set of bogus books?

Mr. Caffey: I object on the same grounds. 1875
The Court: Objection sustained.
Mr. Mooney: I except.

Q. Did you know that one of these railroad companies had a set of so-called unofficial books?

Mr. Mathews: Same objection.
The Court: Same ruling.
Mr. Mooney: I except.

Q. Did you know that one of the railroad officials within this receivership, when called as a witness,

1876 and being under oath, had sworn that there were two sets of books kept by that railway company, one of them official and one of them not official?

Mr. Mathews: Same objection.

The Court: You say "This receivership," you mean the old receivership?

Mr. Mooney: A receivership of the company.

The Court: I mean you are not referring to the present receivership?

1877 Mr. Mooney: No, I am not referring to anybody appointed by this Court in this present receivership, but I am referring to a servant, agent, or employee of a present receiver.

The Court: Objection sustained.

Mr. Mooney: We except to that.

Q. Did you know that an employee of one of the railway companies included in this receivership, when asked why the books were not produced before the Ivins Investigation, under a subpoena, had stated in substance that he did not see that it
1878 would be material to present them?

Mr. Mathews: Same objection.

The Court: Same ruling.

Mr. Mooney: Your Honor having indicated your ruling, I presume you desire counsel to desist as far as possible from the framing of oral questions if there is any other way of presenting the question?

The Court: Certainly, I mean to say that it is helpful from the standpoint of expedi-

1879

tion to refer to the subject matter which you desire to ask about if it be contained in certain papers which you present. My ruling, it will be understood, is not as to matters of form at all.

Q. You are familiar with these sheets of paper that counsel is handing up to you and you have gone over them yourself and worked on them yourself in the preparation for your examination with a view to expedition, have you, Mr. Craig? A. Yes.

1880

Q. Now, I show you two other sets of papers marked V. A. and V. B., and ask you whether the information contained in those sheets of paper was in your mind at the time you wrote the letter, which is the subject matter of this proceeding?

Mr. Mathews: Before the witness answers I would like to look at them. May I ask a question concerning these papers. Do they refer to matters transpiring entirely prior to December 31st, 1918?

Mr. Mooney: That is the present receivership?

1881

Mr. Mathews: Yes.

Mr. Mooney: But I can only couple that direct admission with the statement that it is a continuing matter, because the books of a railway company are a continuing matter and in that sense they relate to the books, records and papers in the very hands of the very receivers that we are talking about. So that in that sense they are current matters. You cannot commence the books of a railway company on the day that you ap-

1882

point a receiver; and that is what our complaint is about. That is what this law suit is about.

Mr. Mathews: Same objection.

The Court: Same ruling.

Mr. Mooney: I except.

Mr. Mathews: Now, in order that the record may be clear, I suppose that these will be marked for identification.

Mr. Mooney: Yes.

Marked "For Identification Defendant's

1883

Exhibits R and S."

Mr. Mooney: We except to the ruling of the Court.

Q. Did you know, at the time that you wrote the letter, that the accounts, and the account books of certain of the corporations in the hands of the Receivers of this Court had been destroyed?

Mr. Caffey: I object on the same ground as before stated.

The Court: Allowed.

1884

Q. Did you know that fact? A. Yes.

Q. And did you know that there was in existence—

The Court: That is, they were destroyed by fire?

Mr. Mooney: Prior to the receivership, yes.

Q. And did you know that notwithstanding the destruction of the books and accounts, that there were in existence certain stub books and memoranda from which the books had been in part reconstructed by an accountant?

1885

Mr. Caffey: I object to that as immaterial.

The Court: Now, did you know is a pretty—

Mr. Mooney: Well, did you have it in mind. We will put it that way.

Q. Did you have it in mind?

Mr. Caffey: It assumes a fact of which there is no proof.

1886

Mr. Mooney: I will tell you just exactly what I had in mind. Of course Col. Caffey wasn't here then, just at that time.

The Court: Was it his belief from what he read in the newspapers?

Mr. Mooney: But we all knew, every man in this room knows it.

The Court: What we read in the newspapers?

Mr. Mooney: It was more than that, your Honor. It was a fact, developed under oath, and I may remind you of the fact yourself.

1887

The Court: I did not mean that. I mean whether the Comptroller knew it from what he had read or from the reading of official records, or—

Mr. Mooney: Let me put it in that way.

Mr. Mathews: I think, sir, Mr. Mooney will get much further and the examination will proceed with fewer objections if he would ask the witness to state what was in his mind. We are not objecting to his leading the witness. He can do that in his reply.

Mr. Mooney: If I did that he might as well discharge me from his employment.

1888

The Court: The question is perfectly satisfactory. I assume you are going to frame it along the lines I have indicated.

Mr. Mooney: I would say this to your Honor: That the evidence I am offering here is all based upon oath and under no circumstances is there hearsay, or flotsam, or jetsam, or anything of that kind.

The Court: Perhaps I had better make myself clear, because I don't think you quite get my point. I think the procedure which

1889

took place in various inquiries prior to these receiverships, generally speaking—I don't confine myself to detail by this ruling—are immaterial. On the other hand, if the witness says, for instance, that either from reading public records or reading or getting information in any other way, which technically would be hearsay, that when he wrote the letter of October 6th, 1919, he had in mind that in previous investigations it had been testified that books had been destroyed; therefore whatever may follow from that,

1890

I have no objection to.

Q. You have heard the ruling of the Court. Will you please—

The Court: What I am seeking to exclude is either the introduction of a copy of such proceedings, upon the ground that I have tried to indicate heretofore, or of the record taking such a shape, that whether these things were testified to under oath or not, that they are now brought in as substantive facts. I think it is only right that

1891

the defendant should disclose to such extent as he and his counsel agree upon what was his real genuine state of mind, what influenced his mind, whether these instructions were wise or unwise, if he desired to lay his mind before the Court it is but just that he should have the full opportunity so to do. I am not seeking to exclude that opportunity under any circumstances, but I do not want the record to get into such a state that collateral subject matter may be mistaken for proof of a substantive character in respect 1892
of matters which occurred before this receivership, and which were in no manner comprehended by any orders of this Court, except in so far as it may be argued that the orders of this Court had a natural, or necessary, or inferable consequence.

Mr. Mooney: I now comprehend your Honor's ruling exactly, and if my learned friend will listen to me in what I am about to say, I think we will save a great deal of time. It is for the very reason, and so as to move along with your Honor's mind, that 1893
I am asking the questions without regard to exact time, date, place or person, so that it shall not have the semblance of proof of a substantive fact, and so that any one who reads this record will say, "Well, Mr. Mooney was proving a state of mind and a state of mind only, because it is destitute of any elements of proof of the substantive fact when he gave none of these particulars." It was for that reason I did not name the place, the time or the occasion and even referred to the accountant as "an accountant."

1894

Now, the reason I am asking you to listen to me while I make this plain, is that we are now upon the very point of this inquiry. In other words, the Comptroller is now endeavoring to make plain that he had in his mind the fact that neither this court nor the receivers nor the mightiest man in God's created world could give him the information which he felt was necessary for the protection of the interests of the city unless he had the right to go and collect, by detec-

1895

tives, by searchers and by investigators the fragments, fragments which had heretofore on another occasion been bound and pasted together skillfully for the purpose of reconstructing these books and accounts.

Why, your Honor, in view of the proof that I am now going to offer, it is nothing but a howling farce for anybody to suggest that a direction to a receiver, that a direction to a subordinate would have supplied this. These men, who have this cloak of respectability thrown about them now, have

1896

been shown in previous times to have done everything possible to prevent the people, to prevent the people of the state and the people of the city from getting at the information which is needed. When they come along here, if they weren't receivers, your Honor would chase them out of the court house with a broom. That is what you would do with them. But, because they are here, having gotten this cloak about them, that they are receivers, therefore representing somebody else, we are in a position where we are supposed to come in here with bated

1897

breath and regard these people as some sort of angels, when we know that in every investigation conducted it has been shown that they have destroyed and gotten away with and suppressed the evidence, and in addition to that, notwithstanding that, that there is knowledge enough in accountancy, and there is skill enough in detectives to reproduce what had previously existed.

Now, that is what the Comptroller wanted, he wanted it that day and he wants it this day.

1898

The Court: You may reframe the question.

Mr. Mooney: Let me reframe the question so that there shall not be any doubt that I am trying to conform to your Honor's views, although I do not wish to be too much circumscribed.

Q. Did you have in mind when you wrote this letter, with respect to the books, records and accounts, of one of the railways in the hands of this receivership that the books—

1899

The Court: That it had been testified.

Q. That the books—that it had been testified—that the books, records and documents had been destroyed?

Mr. Caffey: I object.

Q. But, that nevertheless from stubs of checks and memoranda still extant an accountant could and did reconstruct the accounts of that company in part. Now, that is the question.

1900

Mr. Caffey: I object to that as incompetent. It calls for a conclusion of the witness, and assumes facts not in evidence, and as to which there is no evidence and as to matters which are utterly immaterial.

The Court: I will allow the question up to the point where the witness had in mind that certain books were destroyed. The question will have to be reframed. For instance, I don't know what the latter part of the question means. I don't know whether it

1901

means the witness had that information from some private source or some public proceeding, or what.

Mr. Mooney: Then I will take the answer so far as your Honor allows it and then continue in more definite form for the remainder.

The Court: We will suspend until a quarter past two.

Recess to 2:15 P. M.

1902

Afternoon Session.

2:15 o'clock P. M.

CHARLES L. CRAIG resumes the stand.

Direct Examination continued by Mr. Mooney:

Mr. Mooney: Will you please read the last question?

Last question read by the stenographer.

1903

Mr. Caffey: I object to that question on the general ground that it is incompetent and irrelevant and also that it assumes facts of which there is no evidence, also that it relates to matters wholly irrelevant to the present inquiry.

The Court: I have sustained it except as to that part thereof which refers to the witness having in mind that it had been testified that the books were lost or destroyed and that is where it was left when recess was granted.

1904

Q. Now, will you answer that part of the question which the Court has ruled in, namely, whether you had in mind that it had been testified to that the books had been lost or destroyed? A. Yes.

Q. Now, did you have in mind that it had been testified to that notwithstanding the loss and destruction of those books that an accountant could and did reconstruct from stubs or checks and memoranda the books of the company in part? A. Yes.

1905

Mr. Mathews: Same objection and I want, if the objection is overruled, the question amended so as to show whether or not this was all done prior to the present receiverships.

Mr. Mooney: That is in the question as a matter of what he had in mind.

The Court: Yes, certainly. The matters which you are asking the witness about were matters that had occurred prior to the present receivership.

Mr. Mooney: Yes, but the continuity persists in our view.

1906

The Court: I understand your point, the witness may answer.

A. Yes.

Q. And when you wrote this letter, and referred to the original sources, did you have in mind such original sources as are referred to in your answer to the last question? A. Well, I had that and more.

Q. Yes. A. I had included in the original sources, not only books and entries, but documents and memoranda and agreements and a great variety

1907 of matter of that character.

The Court: Writings of all kinds?

A. Yes, bearing particularly upon the relations of these companies to the municipality of the City of New York and to each other, and to their obligations.

Q. And did you have in mind grants, franchises and other papers that were not ordinarily accessable? A. Yes, sir.

Q. Now, did you have in mind— A. Let me add to that: Particularly those contractual instruments

1908 which related to, which estabished relations between the different companies and which were not a matter of direct public grant.

Q. Now, did you have in mind that it had been testified to that a number of the stubs— A. Just a minute. May I add to that last answer just a few words?

Q. Yes. A. And also the action of the different companies holding these grants in pursuance of those various agreements, etc.

Q. Now, did you have in mind that it had been testified that in the work of reconstructing the

1909

books and referring to the stubs of the checks, that the payees' names were omitted in a great many instances and that the checks themselves had disappeared, or had been destroyed? A. Yes, sir.

Q. And that the purpose of the payment had also been omitted? A. Yes.

Q. And that notwithstanding that by the skill of accountancy and investigation it was possible to reconstruct the books in part? A. Yes.

Q. And did that reconstruction relate to and did the matter referred to, relate to matters of importance and financial interest to the City of New 1910
York? A. They did, and if you wish, I can just add a little to that.

Q. Give a brief illustration of what you had in mind. A. What was pending before the municipal authorities was in substance an application for the revision of the franchises and contract obligations based, not upon the legal grants, but rather upon some equitable claim, supposed to have arisen out of the changed conditions of the times. Now, that application went to the very heart of all of the equities that there were in the franchises, and the inequities, too, if any there were, and the contracts 1911
that had relation to them. In other words, the Board of Estimate and Apportionment could not properly act with regard to any application to amend an existing franchise in any particular, or to supersede it by a new grant, except upon conditions that would be entirely just to the public at the present time.

Q. Now, did you have in mind that the information that you have referred to was not in the personal or mental possession of the receiver appointed by the Court, but that you would have to go further than that to obtain the information? A. I had in

1912

mind that it was in the archives of the several companies.

Q. Have you had experience yourself in such work of investigation and accountancy with respect to original sources for the purpose of ascertaining the truth of such matters? A. I have.

Q. It is a little out of order, but I will ask you to mention at this point any fact that you had in mind with respect to markings and obliterations of markings on records of some of these companies.

1913

immaterial and irrelevant. It has nothing to do with the issues in this case. We are not here going into the question of whether—

The Court: I will sustain the objection. I understand, of course, that unless you in-

Mr. Caffey: I object to that as entirely dicate to the contrary, that this question and other questions are directed to the matters which the witness had in mind as having occurred prior to the present particular litigation.

Mr. Mooney: Again with the qualifica-

1914

tions that I have spoken of, that a set of books as sources of information are a continuing thing.

The Court: Yes, I understand that.

Mr. Mooney: Now, I will put my questions specifically.

First I will except to your Honor's ruling. Then I will put my questions specifically.

Before doing so, may I say to your Honor, that the conference of Counsel during the luncheon hour has resulted in the thought that I should present to you, and

for your consideration, a case that is well known, but still has to be recalled, perhaps, to your Honor's mind: This, of course, is a quasi criminal proceeding. Now, your Honor probably will recall, as soon as I mention the title of the case, the Thaw case, where the state of mind was allowed to be shown by statements of facts, whether of ancient or recent origin, which produced in the mind of the person sought to be charged, a condition which found expression in the overt act. Now, that case was so well considered and so carefully decided, that it may have a bearing in your mind, as it certainly has in ours, which is applicable to the questions that are being asked here.

The Court: I understand that.

Mr. Mooney: You catch the point?

The Court: Yes. I sustain the objection to this particular question. I have already allowed some questions as to the state of mind.

Mr. Mooney: In view of the ruling that you have made on the question of the state of mind, I feel that the record might be made clearer if I return to another question that was asked. That was with regard to the bogus or so-called unofficial books. May I reframe that question to come within what I understand is your Honor's ruling?

The Court: Yes.

Q. Now, when you wrote this letter, did you have in mind that it had been testified to by an official of the railway company, which was in the hands of this receivership, that there were a set

1918

of books known as an unofficial set of books, as well as a set of books that had been produced upon a public inquiry under oath?

Mr. Caffey: I object to that as entirely immaterial.

The Court: Overruled. I will allow it.

Mr. Caffey: I except.

A. Yes.

Q. And did you have in mind that it had been

1919 testified to by the official referred to, that the reason for not presenting the unofficial set of books, although they were also subpoenaed, was that they were not regarded as material? A. Yes, that is not so regarded by the witness subject to the subpoena.

Q. And the witness and his counsel and certain officers of the railway company who had conferred upon the subject? A. Yes.

Q. And did you have in mind that it had been testified that the production of the unofficial set of books in the instance referred to would have

1920 only tended to confuse the figures, or words to that effect? A. Yes.

Q. And that the unofficial set of books did vary in material respects from the official set of books? A. Yes.

The Court: Of course, I assume the record is clear: These answers are all directed to testimony which the witness understood was given at a time anterior to the present receivership.

Mr. Mooney: Yes, sir.

1921

The Court: And coupling that again with your statement that you regard the books as a continuing matter.

Mr. Mooney: Quite so.

Q. Did you have in mind that it had been testified to that the vouchers, namely the checks of one of the companies in the hands of the receivership, had originally borne upon their face two little dots indicating a corruption fund, and that when the investigators were appointed by the State Legislature that those had been altered by the person in whose possession they were, by erasing the two little dots?

1922

Mr. Mathews: Same objection, sir.

The Court: I will overrule it.

Mr. Mathews: I except.

A. Well, I had in mind that situation, but not quite as you have stated it. That is, I knew that those records were not at that time in the possession of the receivers.

Q. That is to say— A. But I knew that they were available to the receivers, if the receivers knew how and to whom and under what kind of circumstances to give the directions to get them, if the Receiver really wanted them.

1923

Q. In other words, that they rightfully belonged to the Receivers, but that they were not in the possession of the Receivers? A. I would not pass upon the question of whom they rightfully belonged to, but they were available to any Receiver who wanted to lay the whole thing before the Court.

Q. And did you know that this corruption fund

1924

just referred to, amounted to a vast sum of money? A. I did.

Mr. Caffey: That is objected to.

Objection sustained.

Mr. Caffey: I move to strike out the answer. You have got the wrong form of question.

Q. Did you have in mind that it had been testified to that the corruption fund thus referred to

1925 amounted to a vast sum of money? A. I did.

Q. And did you know that it had been testified to that that had been charged to an account which the City of New York would be directly interested in if these applications were to be considered and passed upon? A. I had in mind that that corruption fund was used to corrupt one of the public bodies from whom franchises were obtained for certain of the companies in the receivership, which franchises the municipal authorities of the City of New York were being asked to recognize as valid in every respect and entitled to full respect, and

1926 to have amended in such form as to give an increased return to the companies.

Mr. Caffey: I move to strike out the answer as not responsive to the question and also—

The Court: Motion granted.

Mr. Mooney: I except to that.

A. I cannot quite answer that question yes or no, Mr. Mooney. That was the reason. That cannot be answered yes or no in the form in which you

1927

put it, and that is the only reason I did not give you a direct yes or no answer.

The Court: Suppose you repeat the question.

(Senographer reads the question.)

The Court: The witness said he knew the facts.

Q. Now, did you have in mind? A. The difficulty in your question is about its having been charged to an account.

1928

Q. I will omit that. Omit "charged to an account." Now, will you state, please, what you had in mind, that it had been testified to upon the general subject matter of that question? A. I had in mind that there was—

Q. That it had been testified to— A. That it had been testified to that there was a corruption fund of several hundred thousand dollars that had been used for corrupting one of the public bodies from whom franchises had been obtained, and that are now in the ownership of the companies, some of them, in one of the receivership, and which franchises the Board of Estimate and Apportionment was being asked to recognize as the basis for increasing the fare. In other words, that that set of franchises had been illegally and corruptly obtained and yet we were asked to make it the basis of some kind of consideration, as though it had been obtained in a manner in every respect rightly, and that this fund had been used for this purpose.

1929

The Court: Are you now referring to 1884?

A. No.

1930

Q. I will ask you what railway did this refer to? A. The Nassau Electric and subsidiaries.

Mr. Caffey: I move to strike it out as entirely irrelevant and immaterial to this issue.

The Court: Motion denied.

Q. Now, did you have in mind that it had been testified to with respect to another railroad company that there had been a sum of $965,000.00 which had also been used for corruption purposes?

1931

Mr. Mathews: Same objection.

The Court: Objection overruled.

A. I did not understand that all of it had been so used.

Q. Well, $900,000.00 or thereabouts of it had been so used? A. Yes.

Q. And for the purpose of identification was that the Wall and Courtlandt Street Ferry Railroad Company enterprise? A. Yes, but I think there is quite a substantial deduction from the $965,000.00.

1932

The Court: Well, there was some amount.

A. Yes.

Q. $715,000.00, that gets nearer to it, doesn't it? A. Yes, that is right.

Q. And had you in mind that one of the railway companies in the hands of the Receiver at the time of this receivership had, at a time anterior to the receivership, paid out the sum of $500,000.00—that it had been testified to that they paid out the sum of $500,000.00 for political purposes, another sum

1933

of $264,747.24 for political purposes, another sum of $17,000.00, and another sum of $18,000.00; those two latter being coincident, and another sum of $37,942.00 and still another sum of $250,000.00, all of which it was testified had been charged as proper expenditures on the books of the companies.

Mr. Mathews: The same objection, if the Court please.

The Court: Objection overruled.

1934

A. Yes, sir.

Q. And did you have in your mind, at the time, that it had been testified to that entries had been made upon the books of these companies for the purpose of covering up these amounts which you have mentioned? A. Yes.

Mr. Mathews: Same objection.

The Court: Same ruling. The answer may stand.

1935

Q. Now, did you have in mind that the payments referred to would affect the financial interests of the City of New York in the matters or applications that were pending in connection with an increased fare, or a re-arrangement of the franchise relations with the railroad companies? A. I not only had that in mind, but that also, that all of these matters affected the equitable consideration to which these franchises were entitled.

Q. And did you have in mind that if these figures had been traced, that there were likely to be other figures that should be traced? A. Well, that was a fair inference that I had in mind.

Q. And was your state of mind such that you

1936

were willing to pass officially upon any application then pending or suggested for consideration at this conference without a full investigation of those matters? A. I was willing to pass upon any question as expeditiously as it could be taken up and determined, but only upon the disclosure of all the material facts, or with such access to the information, necessary information, so that we would have a definite assurance in mind that nothing was being withheld which was material or which would materially affect the disposition of those questions.

1937

Q. And, in your opinion, and in your judgment, as a public official, would these matters to which you have referred, have materially affected your judgment? A. Why, unquestionably, and the judgment of any other public officers who had to deal with these matters. Let me illustrate that, if I may. A franchise sold, for example, at public auction, when it came to a question of amendment, or modifying the terms in favor of the franchise holder, would stand upon a far different basis than a franchise admittedly obtained originally by corruption, and the legality of which had been sus-

1938

tained, although the parties who granted the franchise had been jailed for corruption.

Q. Now, did you have in mind that it had been testified with respect to the original Broadway franchise, which was in the hands of these receivers, and [illegible] which an application was pending for a readjustment of fares, and a conference was called, that it had been testified that that was obtained by corruption, and so established by the judgment of the Court in the case of People vs. Sharp? A. Yes.

Q. And that involved, did it not, a million dol-

1939

lars, or thereabouts, according to the proof within your mind? A. Yes.

Q. And did you have in mind, also, that it had been established by our Court of Appeals in the case of the People vs. O'Brien in 111 New York, page 1, that notwithstanding the corruption by which the franchise was obtained, it was still a franchise that had to be regarded from its legal aspect? A. I had in mind more than that. My recollection is that the Court of Appeals held further than that, in that case, that that franchise was a contract and protected by the contract clauses of the constitution.

1940

Q. And did you have in mind that if anyone were seeking—that if anyone of these railroads through their receivers, or otherwise, were seeking either a readjustment of fare, or a readjustment of franchise, or a change in the franchise, that the consideration of that question would, notwithstanding the decisions of the Court as to the legal effect, enter into the judgment of yourself as Comptroller, and as a member of the Board of Estimate and Apportionment as to what should be done on such readjustment? A. Certainly.

1941

Q. I am not clear, as Counsel, that I understand the thing fully, but I will put the question this way: From the way that you had in mind that these sums had been charged on the books of the company, would it have been in substance and effect, if there had been a change made in the relation with the railway companies, that the people would be paying for the corruption fund that had been expended in the franchise matters?

Mr. Mathews: I object to that.

The Court: Objection sustained.

1942

Mr. Mooney: I except to the ruling of the Court.

Q. Did you have in mind that with reference to certain of these railway companies it had been testified that there had been a change in the valuations of their franchises and franchise rights of hundreds of thousands of dollars, where in one instance only one-quarter of a mile of railroad had been built? A. Yes.

1943

The Judge: Is this also—

Mr. Mooney: Long prior, but still in the books which were and should have been in the hands of the Receiver.

A. Still affecting the franchises that continue to this day.

Mr. Mooney: Yes.

The Court: The testimony was given as to that sometime anterior to these proceedings.

1944

Mr. Mooney: Yes.

Mr. Matthews: I understand that nothing so far brought out from this witness, except where specifically specified, has applied to anything after the beginning of the receivership now pending.

Mr. Mooney: Well, of course the constant reiteration of that statement, your Honor, is like asking a man to come in Court and sweep him out at the same time. We would not be talking about it if it were not.

The Court: This last question I asked about, because I did not know what it re-

1945

ferred to, and I wanted to be certain as to whether it referred to something anterior to the receiverships or subsequent. Some of these matters are, of course, almost in a sense matters of common knowledge and many of them are familiar to the Court; whereas the question was a bit blind as to the last one, and I didn't know whether it referred to something which took place prior to the present receivership or not.

Mr. Mooney: I will answer as to all of these questions, your Honor, that it is not 1946
claimed by the defendant, in this case now, nor has it ever been claimed by him, that the receivers were dishonest or that they had made any expenditures, or that they had contracted any expenditures. That whole thing is utterly beside the mark. The contention of the Comptroller is, and always has been, that he wanted access to original sources. Now, of course, original sources—that is the whole purport of the communication here, and original sources naturally go back to original times and are 1947
all anterior to the appointment of the receiver.

The Court: I think that statement covers the situation and there will be no need of repetition.

Mr. Matthews: The fact that we claim all this is entirely beside the mark in this case and is absolutely immaterial and irrelevant.

The Court: I understand.

1948

Q. Just for the purpose of keeping the narrative in front of us, your last answer referred to the 6th Avenue Railroad Company, did it? A. It did.

Q. Did you have in mind, at the time you wrote this letter, that the cost per mile of the 34th Street Cross Town Railroad Company had been charged in gross at $6,472,287, or thereabouts per mile? A. Yes.

The Court: That is objectionable in form: That it had been testified to.

1949

Q. Did you have in mind that it had been testified to? A. Well, whether it had been testified to or whether it was a matter of public record with which I was at one time familiar—

Q. I will ask you here, whether you had those public records right at your hand, and, in fact, many of them right in your own personal office as Comptroller? A. Well, I had them both ways. I had them in my own personal office, as a practicing lawyer before I became Comptroller, a great many of them, and then as Comptroller I had other

1950

records which belonged to me in my official capacity.

Q. Now, do you know that it had been testified to or that it had appeared in official reports that the cost per mile of the Fulton Street road, which was only a horse road, was $2,553,097, or thereabouts? A. Yes, sir.

Q. And as against those extraordinary figures, was it in your mind, at that time, that it had been testified to or was the subject of public record that for underground trolley on another line, namely, the 8th Avenue line, it had only cost $166,-

1951

000 or thereabouts, per mile? A. Well, I had that, and I had information also outside of that, that some of the underground trolleys ran as low as $135,000 a mile, and in some cases as low as $115,000.

Q. And that the horse railroad, in comparison with the $2,500,000 a mile, did you have, in your mind, that it been testified, or was in the reports, that another one had only cost $24,000, or thereabouts, per mile? A. Yes.

Q. Now, did you have in mind that it was necessary for you to get at the facts from original 1952
sources with reference to those costs for the exercise of your judgment in your official capacity as Comptroller, and a member of the Board of Estimate and Apportionment? A. I did, and in no other way could the equity in any of these properties which the public authorities were being asked to recognize be ascertained, in my judgment.

Mr. Mathews: I move to strike the answer out as not bearing on any of the issues in this case. It is a conclusion of the witness.

The Court: I will let the answer stand, 1953
because he has added to it "in my judgment."

Q. Now, several of the witnesses for the Government have testified that they obtained information from former employees of the company who had charge of the books and were continued in charge of the books from time to time—that is, they obtained the information from time to time. Now, did you have in mind that in the access which you have testified was needful to you that you needed

1954

the services of individuals to make that plain and understandable? A. Certainly.

Q. And, did you have in mind that only individuals in the employ, or owing a fealty, or duty to the interests which you represented as a public official, could furnish that information? A. Yes, in the sense that they would have to be responsible for the manner in which their work was done.

Q. And had you had experience, as a lawyer, in connection with the results or statements made by public accountants, with respect to costs of con-

1955

struction, the items entering therein and the matters incidental thereto?

Mr. Caffey: I object to that as immaterial.
The Court: Objection sustained.
Mr. Mooney: I except.

Q. Did you have in mind, at that time, that any accountants of the railroad company could, or would, disclose those facts which you considered necessary in the exercise of your judgment as an official?

1956

Mr. Mathews: The same objection. It is immaterial.

The Court: Question allowed.
Mr. Mathews: I except.

A. I cannot answer that yes or no.

The Court: Answer in your own way.

A. What I had in mind was this: That an accountant, or anybody else, would produce the kind

1957

of information, or the character of information that is required to be produced, if he is left alone, he will produce almost any sort of a result, which may or may not reflect in its conclusions beyond underlying facts, but work of this kind has to be done under direction, and the accountants themselves have to be intelligently directed with the view of ascertaining the facts that are material from the point of view of the inquirer.

Q. Now, I think I can put the next question with that help understandingly: Was it, in your mind, that an accountant produces evidence from 1958 the surface of the books, and that you, as a public official, in the discharge of your duties, to which you have referred, desired to go below the surface and find out what the real facts were? A. Yes.

Q. Did you have in your personal book case, if I can use that word, or the book case that is right at your hand in your personal office as Comptroller of the City of New York, the very volumes that are produced here of the investigation commonly known as the Ivins investigation, which have been marked for Identification as Exhibit M.

1959

Mr. Mathews: I object to that as entirely irrelevant and immaterial, what books he had in his library.

The Court: He may answer yes or no.

A. I do not think I had those particular books on that particular day, but they were in that particular book-case, because I think the book-case was brought in later, but they were in the department, or under my control and direction somewhere, the records of nearly every public investi

1960

gation that has been conducted, and in some cases a number of copies of the record are on file in our office in different places, so as to be accessible when these matters come up.

Q. And were you familiar with the condition of this investigation that I am asking you particularly about, the Ivins Investigation, socalled? A. I was.

Q. I notice the books bear your imprint "Charles L. Craig, Comptroller of the City of New York"? A. Well, that is only to distinguish

1961

them. They are not my personal property, they are the property of the City of New York.

Q. And there are marks running through all these books. Are those your personal marks, or some of them? A. Some may be and some may be of others, because those have been worked on by other people under my direction.

Q. Now, has a compendium been made up by and under the direction of your Counsel and under your supervision of the testimony contained in this investigation, known as the Ivins Investigation? A. Yes.

1962

Q. And are you familiar with that compendium? You have been over it with Counsel? A. Yes.

Q. And is this the compendium (handing same to witness)? A. It is.

Q. Has that been prepared for the purpose of economy of space, consisting of about 34 pages, for the purpose of presenting those matters which appear to you and your Counsel to be relevant to this inquiry? A. Yes.

Mr. Mooney: Now, as a means of placing it on the record in the most condensed

1963

form, I will offer the compendium referred to by the witness, and I offer as the basis thereof the official publication itself.

Now, just let me say one word there for the convenience of the Court and for the aid of my adversaries, if they consider it such. These 34 pages I think will elucidate the situation very considerably as an amplification of, a supplement to, the oral examination of the witness. I can see no possible harm to result therefrom, and much good.

1964

Mr. Mathews: I object to it on the ground that it is incompetent, irrelevant and immaterial, even though it may be considered as an original document, as distinguished from a copy or a compendium based upon an original document. The original itself would not be competent.

The Court: I will receive it on this theory: Not that it is any evidence of facts, but as a compendium of what the witness had read, as showing what information he had in mind when he wrote the letter.

1965

Received in evidence and marked "Defendant's Exhibit T."

The Court: Now, it will be understood, of course, that the original papers may be referred to in the event of any errors or corrections.

Mr. Mooney: Oh, by all means.

Mr. Mathews: May Counsel have a copy of that in case we want to check it up?

Mr. Mooney: Certainly.

1966

The Court: In other words—I think my ruling is quite clear,— It is not a matter of any relevancy as to whether a witness was right or wrong in the Ivins Investigation, or in the other investigation in testifying to this, that or the other thing. I am ruling that it is relevant, that the witness may state what information he had in mind and had gathered by reading, or information otherwise obtained which was present in his mind at the time he wrote
1967 the letter complained of.

Mr. Mooney: I understand you exactly. That is just the aspect in which the compendium is offered.

Mr. Mathews: It is understood, of course, that the Government objects to it, even assuming that the witness had it in mind, that is, it is not relevant or material, nor is it competent on this particular trial, and it is not within the issues at all.

Q. This compendium, which I now show you, is
1968 that a compendium of the Minutes of the Grand Jury which have been produced here, and which is prepared in the same way that the other compendium which has been offered in evidence was done? A. It is.

The Court: As I understand the witness went over this himself?

Mr. Mooney: Yes.

A. Yes.

Mr. Mathews: Same objection.

1969

The Court: Overruled. This compendium is received for the same reasons as the previous compendium was received.

Received and marked "Defendant's Exhibit U."

Q. Now, did you have in mind, after your consideration and study of the situation, as disclosed by the testimony referred to, that those proceedings left unconcluded the matters to which they referred? A. I did. That is to say, that many of those investigations had no definite objective 1970
and traveled along certain lines to a certain point and then stopped without leaving an answer to the inquiry in any conclusive fashion.

Q. In your mind, were the results produced by those investigations such that a financial person, or a person having to do with finances, could thereby inform himself of the facts necessary for his judgment? A. May I answer that other than yes or no?

Q. Yes. A. Read it to me, please.

The Stenographer reads question to wit- 1971
ness.

A. There were other than financial questions presented. There were questions of policy presented with reference to the revision of the outstanding franchises, and on those questions, as well as on the financial questions involved no one could intelligently pass without the completion of all the inquiry, that was merely suggested in many cases in these other examinations. In fact, the disclosures of the examinations, the Ivins examination, and others, were mere notice to the public

1972

authorities, and in dealing with these matters they had to sift them to the uttermost in order to arrive at anything like a just conclusion as to what the facts and the merits were.

Q. Did you have in mind that many of these matters thus opened up in these investigations had never been carried to a conclusion? A. I did.

Q. Do you know that there never has been a statement of the financial operations of these railways covering the items which you had in mind as necessary for the exercise of your judgment?

1973

Mr. Mathews: I object to it, the form of the question, also that it is irrelevant, immaterial and incompetent.

The Court: Objection sustained.

Q. Well, we have spoken about certain investigations of certain railways. Has there ever been an investigation of the B. R. T. situation?

Mr. Mathews: I object to that.

The Court: Objection sustained.

Mr. Mooney: I except.

1974

Q. Did you have in mind that it was testified, that it had been testified, that some of these accounts were based on a private check book of one of the officials of the railroad which was carried around in his pocket? A. Yes, sir.

Q. And that the vouchers therefrom had been destroyed? A. Yes.

Q. There is one point that I overlooked when I was asking you about the letter. Was there, on October 6th, 1919, a system with respect to additional sheets known as carbon sheets, in use in the

1975

office of the Comptroller of the City of New York, applicable to letters not intended for publication, and another for letters that were intended for publication? A. Well, there is a routine for the kind of paper and the kind of carbons to be made on matters for publication and on matters that are not for publication.

Q. Describe that briefly. A. Well, the routine on matters for publication is to prepare a large number of copies; they can be run off at one time by the use of thin paper and good carbon, and that is put on a form of paper ordinarily known to the 1976
legal profession as legal cap, although we have a different term for it. Now, communication of which only one copy is required, and that is the carbon copy for office purposes, one carbon copy, besides the original to be transmitted to the addressee, which is made on ordinary letter paper, is made.

Q. Now, in this instance of the writing of Exhibit No. 2, which is the letter complained of— A. Let me add—I may say in explanation of that that those instructions were always given to the stenographer at the time of the dictation, as to what kind of paper to use and the number of copies.

1977

Q. When you dictated this communication, which is Exhibit 2, the one complained of, will you state whether you gave instructions with reference to the carbon copies? A. Well, the only instructions were just for an ordinary letter, that is the ordinary office copy. That is the ordinary routine, and would not require special instructions for any other kind or any additional number of copies.

Q. Are we to understand from that that no express instructions were given with reference to the carbon? A. No. That is the correct understanding. In other words, this was an ordinary letter

1978

to be transcribed on the ordinary letter-head for transmission in the ordinary way, with a carbon, merely for office records.

Q. And not for publication? A. And not for publication. No carbon for publication.

Q. And, as a matter of fact, when the paper itself, Exhibit No. 2, was presented to you for reading, and you read it and Mr. Van Valkenburg, as you testified, read out from the copy in his hands, was he reading from that kind of a carbon which is not intended for publication? A. Yes. In other

1979

words, I had in my hand and I was reading this as he read it. I had the original in my hand, unsigned, and was scanning it over for any kind of errors I might detect, while he read aloud from the carbon, which is on the same size paper, simply a yellow sheet, the same size sheet as this letter here.

Q. And that same kind of a sheet was not a sheet intended for or to indicate publication? A. No, that is merely for the office files.

Q. Did you authorize directly, or indirectly, the making public of the letter, Exhibit 2, or any copy thereof?

1980

Mr. Caffey: I object. That calls for the conclusion of the witness.

The Court: Yes. I will sustain the objection on that ground only.

Mr. Mooney: My learned friend is oblivious to the fact that I am proving a negative, however,—

The Court: No, no.

Mr. Mooney: —if he objects I will except to that.

Q. Did you say to anybody to give out that letter for publication? A. No.

1981

Q. Did you directly, or indirectly, say, or do anything towards the giving out of that letter for publication?

Mr. Mathews: I object to that.

The Court: Same ruling. Objection sustained.

Mr. Mooney: I except to that.

Q. Did you have anything to do with the giving out of that letter for publication?

1982

Mr. Mathews: Same objection.

The Court: You mean physically?

Mr. Mooney: Well, I will take it that far, anyway.

Mr. Mathews: I think it is still objectionable, sir.

The Court: I will overrule the objection.

Mr. Mathews: I except.

A. Nothing whatever, except to sign my name to the original and hand it to the stenographer for transmission by hand to Public Service Commissioner Nixon.

1983

Q. You mean to be exact in your answer by answering that it might be claimed by someone that the sending out of the letter from your hand was a publication? A. Yes, and the other thing—of course, any document of record in the Department of Finance is a public document, so that in a sense the moment this was laid down in the letter book—that is, this is copied by a letter press as well as by a carbon copy—those are public records to which any tax payer has access at any time, and to which access is never refused, even to a person who might not be a tax payer.

1984

Q. Even as one of the witnesses said, "If it was the Citizens' Union." A. Even if it was the Citizens' Union. In other words, we make no discrimination by reason of race, color or previous condition of servitude, as to whether a person shall have access to any kind of document or records in the Department of Finance. As a matter of fact, I may say further, that as the result of large appropriations made for the purpose of preserving those records to public use, there are huge vaults under the Hall of Records, where those records, after a certain age, are kept, and they are at all times accessible to the public upon a mere request, just sufficient supervision to see that there is no alteration or abstraction made.

1985

Q. And you are speaking both of the law and the fact. By the charter these are public, are they not? A. Yes.

Q. Now, so that I shall not leave anything uncovered, I am going to put the same question mentally, or to the mental act, as we did to the physical act a moment ago. Did you do anything, as a mental operation, towards giving this out for publication?

1986

Mr. Mathews: I object to that.

The Court: I will take it.

A. I don't know exactly what your question means.

The Court: I presume the question might be put in this way: In the first place, I gather that your testimony is that you gave no directions to any one person whomsoever to give this letter out for publication?

A. That is correct.

1987

The Court: And that you had no intention at the time to the effect that the letter should be published?

A. I have not ben asked that question. As I understand it, I will be glad to cover that ground, if there is a question pending.

Q. Do so. A. When I dictated that letter and signed it, it went out of my mind. I had a thousand other things to occupy my attention, to think about, and I probably would have given it no more thought, no further thought, had not some commotion developed in regard to it somewhere around the luncheon hour. As I said here, at the forenoon session, this letter was intended to convey suggestions to Public Service Commissioner Nixon and in the light of which, and the facts and the statements contained in the letter he could shape a course of action which would bring about a condition where the public authorities would be in a position to confer not only with him, but with anybody else, with respect to the matters that were involved. There was never any thought that Nixon would read this letter to anybody else. In fact, I have a faint recollection, although I would not be positive about it, that my instructions were to put this in an envelope marked "Personal" for Nixon, himself, so as to avoid the possibility of its falling into the hands of some person connected with the Public Service Commission who might otherwise disclose it and act upon it.

1988

1989

Now, of course, I knew when I wrote the letter that everything that the Comptroller puts his name to is a public document and that at some time or other it may be the subject of criticism or publication, positive or otherwise, and in that sense I

1990

knew that. I wasn't hiding this. On the contrary I knew when I wrote the letter to Nixon that Nixon himself might handle it in such a way that the letter itself would be the best evidence of the action which was taken and of the suggestions conveyed in it to him.

Now, there was no thought of any publication, except in the sense that any public officer, at least any Comptroller must have in regard to anything he signs his name to; and I probably signed on an average of at least one hundred such things a week,

1991

maybe two hundred, on an average, any one of which is subject to publication at any time, and which contain in summary fashion, as concisely as can be put the reasons for a given course of action, or the course of action suggested. So that in that sense, knowing that whatever I did was a public act in the sense that it might, at some time or other, early or remote, because I have had some of these things published a year and a half after the transaction, in that sense it was public property. Yet, there was no action taken on my part to give it any currency or publicity, because, as a matter

1992

of fact, that would have defeated the very purpose which I had in mind when I sent it to Nixon. This was a letter, in other words, for Nixon's own personal information and guidance, and from the very nature of it if it were prematurely disclosed it would tend to embarrass him in making any proper use of it.

Q. Now, I will ask you the question: Did you do any act which either immediately or later gave this paper out for publication?

Mr. Mathews: Same objection.

Mr. Caffey: And as calling for a conclusion.

1993

The Court: I will take it in view of the explanation of what is meant by publication.

A. I had nothing to do with the letter after I signed my name to it and gave it to the stenographer, about 10:40 A. M. that morning. When I did that I was through with it and had nothing further to do with it.

Q. And did you do anything further after that? A. No. I did nothing with it afterwards.

Q. Now, did you omit to do anything with regard to this paper which resulted in its publication? 1994

Mr. Mathews: I think that is objectionable.

The Court: Objection sustained.

Mr. Mooney: I except to that.

The Court: There is one question—I don't want to interrupt you—

Mr. Mooney: Your Honor might just as well ask it now, because I have got to my last question.

The Court: The only question which I would like to call attention to, so that there may be no misunderstanding is, in two places, perhaps in more, the letter uses the plural word "orders." For instance, in referring to the Judge in connection with the letter he says, "He not only denied the relief, but he made orders which preclude any application being made by the Municipal authorities to any other Court or Judge for any right of examination into the affairs or conditions of these corporations seeking Municipal aid and favor." 1995

1996

Just below that the sentence, "The orders of Judge Mayer denied to the Municipal authorities opportunity to ascertain the truth." Now, I would like to know whether the witness was referring there to just the order that has been discussed as to the refusal to appoint a co-receiver or whether he refers to other orders.

Mr. Mooney: Well, the injunctive part refers to other orders, and I will bring that out.

1997

The Court: Yes.

Q. There were served on you, as Comptroller, in connection with some tax sales, orders issuing from the United States District Court, which you had in mind as a foundation for this statement forbidding, mentioning the word "forbidding"? A. I had in mind the order to which you refer, which was an order of general restraint, and which was served upon me personally by a representative of Stimpson to prevent the sale of tax liens on these properties, the sales of which had been adjourned at some previous date to a date subsequent to the receivership, and I had in mind the other orders made in the other receiverships of a like character where a single receiver was appointed to the exclusion of any co-receiver of any kind.

1998

The Court: In other words—

A. I had in mind no specific order directed specifically to the Municipal authorities to restrain them and no others from making any particular application.

1999

Q. In other words, it was a general restraint order?

The Court: I think I can get it clear now. I assume that you refer to the order in each case appointing a receiver and carrying with it the restraining provision that you refer to.

A. Yes, there was more than one, as I recall it, such order, in some of these cases, if not all.

Q. You mean by that, one in each case? A. 2000
There was one in each case and I think there was more than one in some cases.

Q. But you had in mind, distinctly, one in each case? A. Yes. The ordinary order that is familiar to all equity, federal equity receiverships, of general restraint, restraining everybody from any interference of any kind with the receiverships, or any of their agents, subordinates, etc.

The Court: That developed what I had in mind. Those are the orders you had in mind?

2001

A. I had those orders in mind.

The Court: You say no particular order particularly restraining any Municipal authorities?

A. No, and I also had in mind that Mr. Nixon was a public officer of considerable experience and that he would probably understand if I didn't state what particular orders I referred to he would either inquire or obtain copies of them.

2002

The Court: That covers what I had in mind.

Q. I call your attention to this part of the letter— A. I want just to call your attention to one thing before you get any further. Nixon's own letter to me dated the 3rd of October, in which he solicits a personal conference and personal discussion, and if there was any question in his mind on the receipt of this letter as to any matter contained in it, I had a perfect right to assume that was

2003

embraced within the scope of the personal conference and personal discussion he urgently pressed upon me.

Q. And that he would seek you out and ask for a further expression upon the subject which he had initiated in this somewhat personal vein? A. Yes. You notice his letter of October 3rd, which is addressed, "My dear Mr. Comptroller," has a very personal touch to it. That vein runs through it, as though no one else had received a letter of this kind, and I don't know that any one else had received a letter of this kind, and I don't know that any one else had received it, as a matter of fact.

2004

And he has penned a postcript down at the foot with his own hand.

Q. Down at the foot? A. Yes.

Q. He identified that? A. He had previous, to that time, been at my office to discuss personally some of the companies that are now in the hands of a receiver, when he first became a public service commissioner. They were in the hands of a receiver at the time of his calling upon me to discuss the matter. I refer particularly to the Staten Island Company.

The Court: Those are receiverships outside of this Court?

2005

A. Those are receiverships in the Eastern District.

Q. Now, in one of the sentences in this letter— A. And I may say in addition to that that it was a common thing for Nixon to call me, or have me call him on the telephone for a brief conversation if anything required, of any moment, that was not the proper subject of a letter or that couldn't await a written communication.

Q. That is, in the performance of your several duties— A. In the course of official duties, yes. As I said this morning, there was nothing personal 2006
in our relations. They were all together official.

Q. Now, referring to this communication, the second paragraph thereof there is the expression "There must be a reversal of the policy for which Judge Mayer is responsible of denying," etc. Will you say that you meant by the expression "reversal of the policy for which Judge Mayer is responsible"? A. Well, I think, if I recall, if you will take that with something toward the end—if I may look at it just a moment.

Q. You are quite right. A. Where I made a specific suggestion to Nixon, for instance in the last 2007
paragraph, that "As a first and preliminary evidence of good faith, those who desire such a conference and a reasonable solution of existing complications, should procure the entry of orders by Judge Mayer putting the City of New York on an equal footing with the private interests active in the receiverships. A refusal to do this," that is a refusal by these people who were seeking the conference that Nixon says was forced upon him— "A refusal to do this can but prolong and embitter the controversy; and it will not in the end procure

2008

any advantage whatever to the traction interests." Does that answer your question?

Q. We have got to a certain point. I asked you with respect to this and you said that that is elucidated by the last part. Now, is it further elucidated by the expression just preceeding that, "that the responsibility," etc., "rests upon those who procured and are protected by such orders"? A. Yes. I should have read that in connection with the paragraph I read a moment ago; and in the light of well understood equity proceedure in the

2009

Federal Courts there are very few cases where a Federal Judge will refuse to grant an order to which all parties to the litigation make a request, for which they make a request.

Q. And that reversal of policy which you speak of was that a reversal of the policies by the parties and not by the Judge? A. Yes, it was the policy of the conduct of the receiverships, which they had shown, and which they were interested in the continuance of.

2010

The Court: If I understand it correctly then, it was not intended to convey the meaning that at any time the Judge referred to had in point of fact denied access to any particular papers, documents of sources of information except in connection with what you regarded as the results flowing from the refusal to appoint you in your official capacity as Receiver? A. That is correct.

The Court: So that it was not intended to convey to the public mind that the Judge had made any order, outside of the one you referred to, upon any application of the Comptroller or any other member of the

2011

Board of Estimate and Apportionment for access to anything?

A. In the first place, it was not intended to convey to the public mind, but only to the mind of Lewis Nixon, only to convey to the mind of Lewis Nixon, or to whom he might, by his own act, show the letter, that the orders referred to were the orders which in the very inception of the receivership, in my judgment, affectually excluded the City of New York from every kind of information that was indispensible, and which it should have in 2012
order to deal with these questions.

The Court: In other words, the letter was intended to refer to the order denying the motion for a co-receiver, together with the restraining orders to which you have referred?

A. Yes, and besides that there is a matter of history. In order to get into Nixon's mind the necessity, preceding any conference which he might desire to have of taking those steps that would put all the parties affected by the conference and who were required to be present, namely those representing the City of New York, on an equal footing. So that, whether the officials of the City of New York, including the Comptroller, might justly, or unjustly, feel that information had been withheld, that they might be put in a position to know that there was nothing that was being withheld that was of any consequence, nothing that they hadn't a complete understanding of. In other words the public officers might have had an exaggerated idea—I don't say they did have, but it is

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2014 conceivable that some of them might have had an exaggerated idea as to what such access and inquisition would have resulted in, but at any rate they would have had the assurance, after the inquisition that all that was to be known was known to them, and they could then act without any further hesitation or embarrassment.

Q. In answering these questions, particularly those addressed to you by the Court, where he referred to the nature of the order refusing to appoint a co-receiver, do you, in each instance, as
2015 heretofore, include as a concomitant of that order the continuance of the permanent receiver in the friendly proceeding and the retention by such receiver of some of the former officials of the railway. I mean, are those concomitant facts and circumstances to be taken in connection with the order denying the appointment of a co-receiver? A. Yes.

Q. I think it is quite plain already, but I shall ask you the categorical question: Whether by using the expression "reversal of the policy," used by you in this letter, you intended a reversal of
2016 policy by the Judge himself, or a reversal of policy by those who, as you stated in that letter, were responsible? A. I meant the reversal of policy by those who were responsible for the conduct of the receivership. And the reference to Judge Mayer serves to identify to the mind of Commissioner Nixon, the Court, and part of the Court where the order was made.

Q. And where the conferees might conveniently apply to carry out your suggested wishes. Is that it? A. Yes, I presume they could apply with permission to another Judge, to any other Judge, to any other Judge of the same Court at any rate.

2017

Q. It is perhaps wise to put in at this point, what others may not know. You understood at the time of the writing of this letter, did you not, that Judge Mayer was in charge of this receivership? A. I did.

Q. Now, in writing this letter, did you have any intention, whatever, of a contemptuous act toward Judge Mayer? A. Certainly not. Let me add, I had, as I said this morning, an intention, and the only intention I had was to get into the mind of Lewis Nixon a state of facts which he could verify at any stage from various sources, and which once 2018 he had in mind would impel him to follow out the suggestion I embodied in the letter; so that there could be freedom of discussion and a solution of these difficulties.

Q. Now, I will put the question impersonally: In writing this letter, did you have any intention to commit any contemptuous act toward the Court? A. I did not.

Q. Did you have any intention to charge any misconduct, ignominy or wrongful conduct of any kind or character toward Judge Mayer, or toward the Court? A. No. 2019

Q. Did you intend, by the writing of this letter to have any effect at all upon the orders or proceedings of the Court itself? A. Only in this sense: That I expected to have an effect upon the mind of Nixon. I expected Nixon thereupon to deliberate on whether, with, or without, a conference or discussion, he would carry the matter along with the various attorneys representing parties that were at this conference, with the view of making applications of the character suggested in the latter part of the letter.

2020

Q. Of a consent nature by the parties? A. Yes.

Q. And as a preliminary requisite to sitting down with the public officials of which you were one? A. Yes. Exactly.

Q. Well, my associate insists that I put this question to you. I thought I had done it already. I will ask you whether there was any intent, on your part, to affect or compel, or to influence the Court itself to reverse any order that it had made? A. I think I have answered that.

Q. I think so, too. A. If I haven't answered it,

2021 I will answer it.

Q. No, I think you have answered it.

Mr. Mooney: You may cross examine.

The Court: We will take a recess for two or three minutes.

Recess of five minutes.

After recess.

The Court: Gentlemen, we will resume.

2022

Cross Examination by Mr. Mathews:

Q. Mr. Craig, from your answers to Mr. Mooney's questions, I understand that you have been familiar from the time these receiverships were first created, that is, from the filing of the original bill, or a few days thereafter, with the so-called B. R. T. case, you have been familiar with all these proceedings? A. Well, I have kept informed about them, not from day to day, but I picked it up after six or eight or ten weeks, what had transpired in

2023

the meanwhile, if I haven't, I have endeavored to. I have had copies of the record up to a certain point. I am not certain that my files are absolutely complete.

Q. You mean the printed copies that have been supplied from time to time? A. Yes.

Q. Such as we have here in court? A. Yes, I think some of those are my copies, as a matter of fact.

Q. These blue volumes, B. R. T. Proceedings, and then the New York Railway Proceeding as rapidly as they were printed? A. Yes.

2024

Q. You knew of the pendency of the B. R. T. suit then and substantially of the proceedings therein on October 6th, 1919? A. Well, in a general way. I had been absent from the city from, I think, the 29th of July, until the 22nd of September, when I came back. From the 22nd of September to the 6th of October I was pretty well immersed in the making up of the Annual Budget for the City of New York for the year 1920. So that there was not much time to catch up during that period on this matter, so far as the detailed proceedings were concerned.

2025

Q. You had followed the newspapers, had you not, as to the general proceedings in the litigation? A. The fact is that I was in the wilds of Canada and I had given express directions not to let any newspapers or letters, telegrams or any other form of communication get to me, except in case of an extraordinary emergency, in which case a runner could get in the forest where I was. That emergency never arose. As a matter of fact from somewhere around, well, the early part of August until after the 20th of September, I did not have a newspaper to read.

2026 Q. On September the 22nd you returned to the city? A. Yes.

Q. Now, you recall distinctly, I take it, the preparation of the resolution of the Board of Estimate and Apportionment? A. Well, in a general way. Hundreds of matters have gone through my mind since then. Is there any particular point you may direct my attention specifically to?

Q. I believe you stated you prepared the resolution and cast your three votes for it? A. I am not so certain about casting the votes. I have a recol-
2027 lection, almost a certainty, I think, that I refrained from voting.

Q. You were present at the meeting at which it was adopted? A. Yes.

Q. And you were familiar with the proceedings at that time before the District Court? A. Well, in a general way. I wouldn't say that I had examined all of the records. Because, you see, the pressure of public business doesn't permit the reading of a record the day it comes in. It may lay there for three or four weeks before there is a moment to even turn to the title page.

2028 Q. You know that about that time, about January 15th, 1919, the New York State Public Service Commission for the First District had applied to this Court for leave to intervene in the B. R. T. suit in the name of and in behalf of the City? A. I knew an application of that character was made, yes. I may have misunderstood the time in your last question.

Q. Well, you knew that they had applied for the appointment of a co-receiver? A. Yes, I know an application of that kind had been made, but I did not regard that as a friendly application or one

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that would have served the interests of the Board of Estimate and Apportionment or the City of New York; whatever interest may have been served for the City of New York as represented by the Public Service Commission or whatever right they might have had to represent the City under special contracts of the B. R. T.

Q. As a matter of fact, the Corporation Counsel was given directions to oppose the action of the Public Service Commission in assuming to act for the City? A. Whatever directions were given to the Corporation Counsel were embodied in the 2030
resolution of the Board of Estimate and Apportionment.

Q. You knew then, that following that resolution, the Corporation Counsel did file an application for the appointment of you as co-receiver? A. I was so informed, yes.

Q. You knew that that came on for a hearing on or about January 15th, didn't you? A. Yes.

Q. And you knew that on the hearing the Court, in passing on the motion of the Public Service Commission and the application of the City presented by the Corporation Counsel, the Court had 2031
stated: "I do not for a moment foreclose the proposition that there may readily come in the course of this receivership a time when one or more receivers may be regarded as helpful and necessary to the Court. I can imagine that when the time comes to work out the financial future of this company, that the aid of a receiver representing at that time the united view of the public authorities, may be of great service, and I do not wish to be misunderstood as dealing with anything but the situation as it now stands upon this 15th day of January, 1919.

2032

"There may very well be a time—I repeat—when especially dealing with the financial situation, it may become extremely helpful and co-operative to have an additional receiver, but I do not see that that time is here at the moment. At this time what this receiver is concerned with is to get down to business as fast as it can. It has already started * * *.

"In the circumstances * * * I deny the motion for a co-receiver, without prejudice to its renewal at such time as counsel may be advised." A. I

2033 knew that the Judge's memoranda contained that and other statements.

Q. You knew that a few days after the Court entered a formal order containing this language, did you not? "The applications made herein on behalf of The City of New York and on behalf of The Public Service Commission for the First District of the State of New York for the appointment of an additional receiver or receivers herein are hereby denied without prejudice to the right to renew said applications or either of them at such time as counsel may be advised."

2034 "Decision upon the application of the Public Service Commission for the First District of the State of New York for leave to intervene as a party herein is hereby reversed.

"Notice of all subsequent proceedings herein, other than those relating to the ordinary current administration of the receivership shall be given to the solicitors for the following, namely:

The City of New York,

The Public Service Commission for the First District of the State of New York."

Q. You knew that, did you not? A. I knew that that was included in the action of the Court.

2035

Q. You knew, also, did you not, that the City had never renewed its application for the appointment of a co-receiver? A. I did.

Q. You knew that the City had never applied for leave to intervene in the B. R. T. proceeding? A. I did, except, with respect to that, I knew there had been a proceeding with respect to certain certificates, receiver's certificates, which, however, does not go to the main question.

Q. Don't you know that on that proposition, the receiver appeared specially and declined to intervene? A. You mean the City?

2036

Q. I mean the Corporation Counsel, for the City, merely filed an affidavit? A. I don't know what the detail steps taken were, but I knew he had no authority at any time to make an application to intervene or to appear generally after the order of January 15th was made.

Q. Nor was he ever requested to or given the authority by the Board of Estimate and Apportionment or by yourself? A. No.

Q. And you never, in any way, made any such application to the Court on behalf of the City? A. No, we had very good reasons for not so doing.

2037

Q. You knew, did you not, that the Corporation Counsel from time to time was being served with notice of the proceedings taking place before the Court? A. No, I did not know anything about that.

Q. You didn't have any reports of that at all? A. I had no knowledge or information about that except in a general way, a general sort of way. I assumed that from what I read in the newspapers that the Corporation Counsel was taking some proceeding, which I assumed were on his own account, because they were not on my account nor on the

2038 account of the Board of Estimate and Apportionment.

Q. Did you ever discuss with the Corporation Counsel this matter of whether or not he had notice of the proceedings, copies of the papers? A. No.

Q. You knew of the direction and the order requiring the papers to be served on the Corporation Counsel? A. I have answered that.

Q. You were advised, were you not, of the institution of the so-called New York Railways suit shortly after it was instituted? A. I was informed,

2039 if that is the sense in which you mean "advised."

Q. Yes. A. Yes, I had information of it.

Q. You had information of it? A. Yes.

Q. You knew that Job E. Hedges was appointed temporary receiver? A. Yes.

Q. And that later on he was made permanent receiver? A. Yes.

Q. And that he took possession of the properties and began to assume the jurisdiction and control of them as an officer of the Court? A. I knew he was reported to do that. Whether he did or not in fact I never had any particular information.

2040 Q. You knew that the Corporation Counsel had appeared before the Court in these proceedings, didn't you? A. Well, not any further than I stated a moment ago, when I understood your question to relate to all the receivership proceedings.

Q. You had the same information with respect to the New York Railways that you had with respect to the B. R. T.? A. I had the information I have testified to here a little while ago, such as I get from the newspapers, when I had a chance to read the newspapers in relation to those things.

Q. You knew, did you not, that the City of New York had never in fact applied to the Court for

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leave to intervene in the New York Railways suit? A. Yes.

Q. And that it never applied for the appointment of a co-receiver in that suit? A. Yes.

Q. And that no one on behalf of the City had ever made any such application? A. Yes, I knew that.

Q. You received information, did you not, concerning the institution of the bankruptcy proceedings against the Interborough Consolidated Corporation? A. Yes.

2042

Q. And you knew that Mr. Sheffield was appointed Receiver and subsequently elected Trustee? A. Yes.

Q. You knew, did you not, that the City of New York had never appeared in that proceeding? A. I knew that no appearance was ever authorized.

Q. And that no relief had been asked for on behalf of the City? A. I know that no relief was ever authorized to be asked for on behalf of the City.

Q. And that is true with respect to all three proceedings with the exception of the application for the appointment of a co-receiver in the B. R. T. matter? A. And the question involved in the issuance of Receiver's Certificates by the B. R. T.

2043

Q. You received information, did you not, concerning the memorandum of Judge Mayer, dated Septembr 6th, 1919, on the Stone & Webster report? A. I was absent from the City then. I don't remember having had that called to my attention.

Q. I show you a copy of the memorandum I have referred to, which is Government's Exhibit No. 26, and ask you to look at it and see if you cannot refresh your recollection with respect to the infor-

2044 mation concerning this (hands paper to witness)? A. Now, what is your question?

Q. Did you not have information concerning the memorandum of Judge Mayer of September 6th, 1919? A. I think I did, but I won't say at what time. I certainly didn't have it any time in the month of September, 1919.

Q. Did you have information concerning this memorandum prior to the writing of the letter of October 6th? A. My best recollection would be that I did not.

2045 Q. That you did not? A. Yes.

Q. Can you state when this was first brought to your attention? A. My impression is it was some time afterwards as the result of a conversation with somebody, that I had somebody get me some copies of it. I think it was quite a while afterwards, as much as two or three months afterwards.

Q. Who was the sombody to whom you refer? A. Well, some subordinate in the office. I don't remember at the moment who it was.

Q. Did you look into your own files to see if you had a copy? A. I did not personally look into the files.

2046 Q. Did you have your files examined? A. Very likely.

Q. Did you find a copy there? A. My recollection is that there was a copy found there.

Q. That there was a copy found in your files? A. Yes, at a subsequent time.

Q. What occasioned the examination to see whether you had a copy of this memorandum? A. Oh, whenever we have what is known as a "live file," for the purpose—which is the subject of constant re-examination to see that nothing escapes attention. Papers may lie in the file for a week

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or a month or six weeks, but there comes an interval of some time that requires that file to be taken out and re-examined, to see if there is anything which has developed that requires any action at that time. The work is divided in different ways. We have one file called the "daily turn-over stuff," which has to be examined daily; although there may be papers that have been there for months to see whether the day has brought forth anything that will facilitate the solution of that matter.

Q. When you wrote this letter of October 6th, did you make an examination of this "daily turn-over" 2048
file, or of any other records to see what proceedings or records and information you had concerning these proceedings? A. That couldn't be in the "daily turn-over" file to begin with. In any event, when I wrote this letter of October 6th, I did not make any examination of any file on October 6th.

The Court: What was the day you returned from Canada?

A. September 22nd.

Q. Then, when you wrote this letter of October 2049
6th you wrote it without making any inquiries as to what had happened between the time you went on your vacation and the time you dictated the letter? A. I wrote it with my knowledge of the facts which were pertinent to the letter and in the light of the information that I had.

Q. Have you read Government's Exhibit No. 26 since you wrote that letter? A. I don't know it by that number.

Q. I am speaking now of Judge Mayer's memorandum. Let me ask you now specifically: Have

2050 you read that portion of Government's Exhibit 26? A. Yes, I have read the Judge's memorandum—

Q. (Continued)—in which the Judge says—"in order that the gravity of the situation may be generally made known, and that some appropriate action may be taken as speedily as is consistent with full information, the receivers are instructed to send a copy of the summary of Messrs. Stone & Webster and of this memorandum to the State and Municipal authorities and to Civic and Taxpayers' Association of the Greater City. At the same time
2051 the receivers will make it clear that every facility will be afforded, both to the public officials and Citizens' Associations to satisfy themselves in respect to the actual financial and other conditions existing in relation to the corporation now in their official charge"? A. I have read that.

Q. You had read that when you wrote the letter? A. Well, I won't be certain whether I had, but my impression is that I had.

Q. That you had, on October 6th? A. Yes.

Q. And your impression is, when you wrote that letter you had that in mind, in the same way you
2052 had these other matters in mind, about which Mr. Mooney has interrogated you? A. Yes.

By the Court:

Q. Do you recall whether you read the letter of transmittal, signed by Messrs. Garrison, Hedges & Sheffield, which, in effect, repeated the clause to which Mr. Mathews has just referred? A. Well, I wouldn't be certain as to that. I am willing to assume that I did. In other words, I do not want to evade any question of responsibility for having read it. My recollection is that this memorandum,

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the first copy that came to my attention, did not come from the office files, and that when this search was made, it developed a communication of this kind in the files, but my recollection is that they were not attached, but they may have been.

By Mr. Mathews:

Q. Have you got that copy available? A. It can be dug out, I guess.

Q. The letter of transmittal, signed by the Receiver for the B. R. T., and the Receiver for the New 2054
York Railways Company, and the Trustee of the Interborough Consolidated Corporation states, "We desire to state that every facility will be afforded to you to satisfy yourself in respect of the actual financial and other conditions existing in relation to the corporations now in our official charge." Is it your impression that you had read that— A. Yes. It is—

Q. —Before you dictated the letter of October 6th? A. Well, my impression is that I had not read it before, but it would not have made any difference with respect to that letter, if that is what 2055
you want to get at.

Q. I want to get at the fact. A. My best recollection is that I had not read it at the time that the letter was sent, but that it did not affect the subject matter of the letter.

Q. But you had read that portion of Judge Mayer's memorandum, and I assume all of it, prior to October 6th? A. I think so. I may say that does not affect the subject matter of the letter. The kind of information that would be furnished in that way would be of no value whatever to the muni-

2056 cipal authorities in discharging their responsibilities in this matter.

Q. I understand your testimony, in answer to Mr. Mooney's questions that the matters in your mind when you wrote this letter, were principally matters relating to the former traction difficulties in this city. That is true, isn't it? A. I think you misunderstood that. They relate to existing conditions, the conditions existing on October 6th, 1919, and prior thereto with respect to the transportation facilities in the City of New York as dis-
2057 closed in a fragmentary fashion from time to time by the matters to which Mr. Mooney referred and by general knowledge of that subject with which I had been in contact for a great many years.

Q. What effort had you made in the B. R. T. matter to procure access to original sources of information after the Receiver was appointed? A. My efforts ended when the order was made excluding any representation in the Receivership by the City of New York.

Q. You mean— A. Except as—

Q. You mean that the application for the ap-
2058 pointment of yourself, as receiver, was the only effort that was ever made by you for access to original sources of information in the B. R. T. receivership? A. I think that is a fair way to state it. Yes, because that matter was effectually disposed of in that proceeding and nothing short of that kind of relief would have given the municipal authorities any access to the kind of information that is indispensable that they should have to deal with these questions.

Q. Although you knew that the Court in denying that application had expressly reserved to you the

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right to renew it at any time? A. Yes, but I knew that in two subsequent matters a single receiver had been appointed at the instance of the same, very largely the same interests, so that that question had been twice subsequently really determined.

Q. Had you made or was there made at your instance or otherwise any application in the two subsequent matters for the appointment or co-receiver? A. I have answered that.

The Court: He said no before.

2060

Q. You assumed, then, that because the Court appointed only one receiver in the New York Railways matter, and only one receiver in the bankruptcy matter, that it would be futile to apply to the Court for the appointment of a co-receiver in those matters and, therefore, you took no action in that matter? A. I assumed, and I supposed the other members of the Board of Estimate and Apportionment assumed also, that the method of conducting those receiverships was established with the major receivership, the one that first came into court, and that it would be entirely futile, until some action was taken by those who were instrumental in the carrying into effect of that policy to attempt to change it, for the municipal authorities to do anything further in that direction. For it was well known throughout that our views were opposed by all the parties in interest on the other side, and that we could not hope to get anywhere as long as we were left high and dry on the side lines, as it were. It was a matter to come entirely from the other side.

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Q. So, instead of applying for relief, or renewing your application through the only channel from

2062 which you thought you could get relief, you did nothing? A. We did not think we could get relief. Nobody on the other side who was instrumental in procuring the entry of it, had taken any steps at all. We were confronted by an order that nobody interested in the receivership had taken any steps to have modified, or supplemented, in any fashion, and we understood it was perfectly futile to take any steps in that direction as long as that opposition continued.

Q. When you refer to opposition, I wish you
2063 would state exactly what you mean. A. I mean the opposition of the plaintiff and the defendant, and their respective counsel in the receivership, and the subsidiary companies. I guess they are all defendants.

Q. And of the security holders? A. The parties, the parties—those who were parties in the receivership.

Q. Did you understand that there was any opposition on the part of the Court as distinguished form the parties to the litigation? A. I understood that the action of the Court represented the desire
2064 of the parties.

Q. And that the Court was arrayed with them in opposition to the City? A. No. That the Court, like any other court, would enter almost any kind of an order that the parties agreed upon, or consented to. It is the commonest kind of thing for consent orders to be signed without even an examination by a Judge of a court. That applies not only to Federal Courts, but to almost all courts that I have had experience with.

Q. Well, as a lawyer, and as the representative of interests which you have described as being very important, particularly after the expression of the

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Court, in denying the original application, reserving the right to renew it, didn't you think, as a lawyer, that you should, if you felt aggrieved at the action of the Court, take advantage of the permission to renew and renew your application for the appointment of a co-receiver? A. In the first place, I wasn't thinking as a lawyer. I was thinking as the Comptroller of the City of New York. In the next place, I think I have covered it fully as to the other part. I think I have fully answered it. If I haven't I will make such further answer as you desire.

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Q. No. I want you to answer the question. A. I will go over it again. We made and presented, with all the force we had at our command, the necessity for representation by the City, or in behalf of the City, in the receivership when the matter first one came along. That was opposed by the parties in the receiverships. The City was not a party. It had no right to be heard. It could not even appeal from the order made by the Court denying the application, even if the order had not contained a reservation of the right to renew. So the City had no rights in the premises whatever, and whatever presentation had been made, they had all the facts lying here in the record that they would have had by reiteration; and all the parties on the other side understood—and if they didn't understand, it was brought effectually to their minds, to their attention, and to the mind of Commissioner Lewis Nixon by the letter I sent to him on the 6th of October. In other words, only a party could apply to modify an order in the action or in the course of the proceeding. A stranger could not do it, and the City had to be careful, moreover, that it didn't do something, that by some in

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2068 advertance or otherwise, that might be construed in making it a party to the cause.

Now, the City is not subject to the orders made in the course of these receiverships, because it is not a party, that is, except in the sense that they are orders of restraint against the whole world, but the property rights of the City of New York are not affected by the orders made in the actions, because it is not a party. We were anxious to avoid any situation by which it might ever be held, by any court, that we had, by inadvertance or other-
2069 wise, subjected the City of New York to the jurisdiction of the receivers.

Q. It was your impression, then, that the City had no right in the first instance to apply for the appointment of a co-receiver. Is that right? A. Well, they had a right in the sense that they could present the matter to the Court. But, as a party, they could not do that.

Q. And they had the same right to renew that application, didn't they? A. Well, I suppose they had as much right to renew it as they had to take it in the first instance, except that, in the legal
2070 sense, the right to renew only ran to parties; and the City, by any attempt to renew in that way, might have brought about the very condition I have just referred to.

Q. You say that you knew that the orders of the Court could not bind the City in any sense? A. No. I didn't say that.

Q. I misunderstood you then. A. I didn't say anything about that. I said the City was not a party and its property rights could not be affected by the orders made in the course of the receivership to which it was not a party, except in such a way as the order ran against

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the whole world, an order of restraint, or injunction would affect the City as it would affect anybody else.

Q. These orders were merely the usual orders that require operation on the part of the Receiver, are they not? A. I would not say whether they were usual or unusual. They are orders that are frequently seen in the course of Federal equity receiverships.

Q. You say they are unusual? A. I said I wouldn't say that they are usual or unusual. I have had a large experience with orders in Federal 2072
equity receiverships and my experience is that they differ in very material respects from time to time, so that I haven't compared these with other orders to see if there is any material departure from any of them.

Q. You had in mind something very definite and specific when—did you not—when you said the orders of the Court "had stood between the City and the truth"? A. Yes.

Q. I wish you would specify just the particular order or orders you had in mind? A. I had in mind in particular the order which expressly excluded 2073
the City from any representation in the said receivership and which, at the same time, as a part of the same order, appointed a single receiver; and the orders following that, in form and in substance, in the succeeding cases appointing a single receiver, and the provisions contained in those orders excluding interferences, etc. But the whole thing is this: That the only effectual method of getting first hand information in regard to these matters, is access, with power to compel the production of any kind of document, or evidence, or record that may be under the control of the company, or its

2074 employees; and a mere outsider, being regarded as a guest, as it were, hasn't any such power. So that when you eliminate the only functionary who can do that in a receivership,—when you eliminate him, you close the door to everybody except the single receiver who remains in charge. Now, if I haven't made that plain I will state it over for you in as many ways as you would like to have it.

Q. The Receiver is always subject to the immediate direction and control of the Court, is he not? A. Yes, on application.

2075 Q. And always subject to removal? A. Yes, on application of the parties ordinarily.

Q. Always subject to removal by the Court? A. On application of the parties, ordinarily.

Q. And on application of anybody else for misconduct, is he not? A. I don't know of any case where a Receiver has ever been removed on application other than the application of a party.

Q. You know it practically resides in the Court to remove a Receiver on its own motion on the ground of misconduct? A. I suppose the Court could remove him of its own motion without any

2076 ground whatsoever?

Q. And the Court is always supposed—the Court is always open to complaints, or charges, against its own officers, is it not? A. From proper parties, yes, sir.

Q. And if there has been any misconduct on the part of its receivers, or anyone representing them, for which they were responsible, that matter could be brought to the attention of the Court? A. I assume that it could. Whether it could be done with effect or not, is a different question.

Q. As a matter of fact— A. Depending upon

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in whose possession the control of the evidence might be.

Q. As a matter of fact, you know that no such charge was ever preferred against any of the officers or their subordinates in any of these proceedings? A. I think that is the fact.

Q. Except such charges as are contained in your letter of October 6th? A. Well, I don't think there are any charges in that letter against any of the officers or subordinates. If you find any such, anything of that kind, I would be glad to have you bring it to my attention.

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Q. In this letter you say, "There must be a reversal of the policy for which Judge Mayer, is responsible, of denying to myself and other members of the Board of Estimate and Apportionment any access to original sources," etc. I wish you would tell me just what you had in mind when you wrote that sentence? A. I think that is elucidated in the last two paragraphs of the letter. I had in mind, what I said before, and what is shown in the last part of the letter, that the impounding of all of the evidence in the hands of a single receiver and excluding from the receivership any representation on the part of the public authorities effectually closed the door to the public authorities and left them where they could proceed only by sufference of the receiver, and by consent of the other parties.

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Q. You say, "the door was closed." Did you ever make any effort to get in that door? A. We made a very vigorous effort, when we directed the Corporation Counsel to apply for a receiver. You could never do anything but bring facts to the attention of the Court. I could not state the proposition in any other way than I have already. That application was denied, and it was not only denied

2080 on behalf of the City, but an application of the same general tenor was denied when it was made by the Public Service Commission in behalf of the City. So, that in principle, it was twice denied at the instance of those who were parties to a consent receivership.

Q. That was denied at the same time, at the same moment and in the same order? A. Yes.

Q. Now, neither party, neither the Public Service Commission nor the City ever renewed that? A. I think I have answered that twice, but I will
2081 answer it again. The City never did. So far as the Public Service Commission is concerned, I have no information that they ever did.

Q. When you say, Judge Mayer refused to grant any of the relief sought by the City, you mean, I suppose, that particular relief applied for in the one proceeding, the B. R. T. Proceeding, when a co-receiver was asked for? A. I meant that application, yes, and the consequences that followed from it.

Q. Did you mean any other application? A. I meant that particular one and the consequences
2082 that followed from it, and no others.

Q. In your letter you say, "He not only denied the relief, but he made orders which preclude any application being made by the municipal authorities to any other Court or Judge for any right of examination into the affairs or conditions of these corporations seeking municipal aid and favor." What orders did you refer to there? A. I referred to the orders of restraint, that apprised Nixon sufficiently of what the situation was, and if he had had any doubt as to what the situation was he could have inquired.

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Q. Mr. Nixon could inquire? A. Yes. You may not have in mind that Nixon was not Public Service Commissioner at the time that these receiverships were instituted.

Q. He was appointed when? A. He was appointed sometime in the month of June, I think, 1919.

Q. This letter, then, was intended to educate Mr. Nixon in matters that had transpired in the receivership before his appointment? A. In material aspects, yes.

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Q. So you refer to no other orders than those you have already generally mentioned? A. Yes, and the other orders for a single receivership, made in the other receiverships, I have already referred to.

Q. In the next paragraph, you say, "The orders of Judge Mayer deny to the municipal authorities the opportunity to ascertain the truth." Now, to what orders do you refer there? A. The same orders.

Q. The same orders. Any others? A. I had no other orders particularly in mind.

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Q. Tell me what effort the municipal authorities made to ascertain the truth? A. They made the effort for equal representation in the receiverships and for access to the original sources. Being denied that, they regarded any other kind of information, no matter who might furnish it, as of no completeness or reliability, that is, reliability in the sense that it did not cover the whole field.

Q. I understand, then, that the only effort that was ever made to ascertain the truth was the application made for the appointment of a co-receiver? A. I think this is the fifth time I have answered that, but I will answer it again.

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The Court: Yes, it has been frequently answered.

A. If the suggestion in the letter to Commissioner Nixon had been followed out, it would have all been cleared up and opened up.

Q. Now, you, I believe, said that you and Mr. Nixon frequently, where there was not sufficient time for correspondence to pass between you, discussed various matters over the telephone? A. Not quite as broad as that. I said, or meant
2087 to say, that frequently there were conversations over the telephone between myself and Mr. Nixon about matters which required to be disposed of and which did not need the formality of a letter, or which could not wait for a written communication.

Q. And you had often seen him? A. I did not mean to create the impression that it was an habitual matter, or that these were conferences in the sense that you use the term.

Q. You had seen Mr. Nixon personally a number of times after you returned from Canada? A. As
2088 a matter of fact, I don't think I had seen him after I returned from Canada, prior to the 6th of October.

Q. Hadn't you seen him prior to the Wednesday conference—I think it was on the first day of October? A. I think not.

Q. You hadn't seen him at all then after the 22nd of October? A. September, you mean?

Q. September. A. That is my recollection.

Q. Had you talked to him over the telephone after the 22nd of September? A. I think it is quite likely. I am just trying to fix the date of one conference I had with Nixon, and I am not certain

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whether it was before I went away at the end of July or immediately after my return after the 22nd of September. My impression is it was in July. It may have been in September.

Q. You received Mr. Nixon's letter of October 1st—I think that is Government's Exhibit 1—on October 2nd, did you? A. It was received in my office on that date.

Q. And you were at your office on that day? A. Yes, but that does not mean that it came to my personal attention, as I can illustrate right now. Matters received at my office, since I have been here at 10:30 this morning bear the time stamp as of today, but they will not be seen by me today, for obvious reasons.

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Q. When did you first see this letter?

The Court: He said October the 6th, I think.

Mr. Mathews: That was the other letter.

The Court: Oh, that was the other letter?

Mr. Mathews: Yes.

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A. My impression is, that I saw it on the 3rd—on the 4th.

The Court: Saturday?

A. Yes, Saturday.

Q. You knew then, didn't you, that you had an engagement for 10:30 Monday morning? A. Certainly I knew it.

Q. That telephone service during the day following the 2nd was all right, and you could have telephoned Mr. Nixon, couldn't you? A. Now—

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Q. Will you answer the question? A. It is an unfair question. I don't think you understand the situation, or you wouldn't ask it in that way. In the first place, it is my recollection, that this letter did not come to my personal attention until sometime Saturday. Now then, on Saturday it might have come to my attention after twelve o'clock, at which time the Public Service Commission is supposed to have closed and its telephone service is cut off a very few minutes after twelve, and there would have been no operator, even if I

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had the intention of telephoning, I would not have had the facility, but probably I had no intention of telephoning.

Q. Is it your recollection then, that this letter was not received until Saturday? A. My recollection is that it did not come to me, personally, until Saturday.

Q. Did you know anything about the existence of that invitation to that conference before Saturday? A. I cannot say that I did.

Q. Is it your recollection that you didn't know it until this letter came to your attention? A.

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That is my recollection.

Q. And although the letter was received in your office, according to the date stamped on it, apparently at 10:30 in the morning of October 2nd, 1919, your recollection is that you did not see the letter or have any information concerning it until Saturday? A. That is my recollection and I can give you the reason why that would be the case, if you desire it.

Q. Yes, I assume you were busy with the Budget Committee all that week? A. We had public meetings. The Board of Estimate meets on Friday,

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which was the 3rd of October, and the Sinking Fund Committee meets on Thursday, which is the 2nd of October, and those two meetings occupy several hours of a day and there are matters preceding them that must be gotten in shape for disposition at the meetings. Then there is always a flood of matters which have accumulated during the day that are of an emergency character, that must be disposed of the first moment I return after the meeting, and that condition would suffice to exclude this kind of a letter from being read on those days.

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Q. The traction situation, at that time, was considered by you as somewhat critical, wasn't it? A. It was in bad shape. There is no doubt about that.

Q. You knew, didn't you, that some of the lines making up the so-called Green car system, were disintegrating, were about to disintegrate? A. I knew there had been going on disintegration from 1903.

Q. And that the storage battery lines had shortly been stopped? A. I am not sure as to that I knew that at that particular time. I haven't any recollection of that specific line.

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Q. Haven't you a recollection that at about that time the public press was carrying large headlines of the traction situation and the differences between the various persons interested and the public? A. I knew that headlines were being carried, and now that you remind me, of another thing: That the Second Avenue line had been on the rocks and in the hands of a receiver for eleven years, so the question of a surface line going wrong and coming to a point where it could not make any money for

2098 security holders was not anything new or novel, but on the contrary was one of the inevitable consequences of the establishment of a rapid transit system for the City of New York which practically paralleled all of those surface lines for their entire length, or a greater part of their length, with local and express service, in the same streets in most instances, and anybody with an ounce of intelligence knew that the inevitable consequence of that would be the extinction of the surface lines sooner or later.

2099 Q. You do not recall though, that on October 6th, or a few days prior thereto, some considerable time prior thereto, in fact, that at that time there was considerable public concern and excitement over the traction situation? A. I have a very distinct recollection that there was public concern and excitement for a very considerable period anterior to that, at that time, and subsequently. There is no question about that.

Q. There is no doubt that the excitement at that time was at avery high pitch? A. I don't know how high the pitch would be, but, unquestionably

2100 it existed very extensively. That was one of the things that I expressly directed Commissioner Nixon's attention to in the letter I sent him on that day.

Q. You had discussed the traction situation with your friends and other people, hadn't you? A. I had discussed it with a great many people, some friends, and some not.

Q. And you were, at that time, pretty thoroughly in touch with the whole situation, weren't you? A. I had been in touch with it for a great many years, even before I became Comptroller.

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Q. And especially so at that time? A. Well, I was in touch with it as soon as one could get in touch with it after coming back from a vacation in the country, I think I may say I was in more intimate touch with it than any other public official in the City or State of New York, if that helps you to get an answer to your question, and that is the fact.

Q. What time did you get to your office on October 6th? A. About 9:30. Before 9:30 I am usually there.

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Q. You said it was about 10 o'clock when you dictated this letter? A. Between 10 and 10:30.

Q. And you dictated it to Mr. Van Valkenburg without having him submit a draft to you? A. Yes.

Q. And before it had been written out you had gone into the room of the Budget Committee where the Budget Committee was sitting? A. Yes.

Q. Do you recall, independently, who the persons were who were present that day? A. At that meeting?

Q. Yes. A. Well, I could refresh my recollection. There is a record kept of the attendance.

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The Court: Have you got that record?

Mr. Mathews: I think I have it here. That was marked for identification and never offered in evidence.

The Court: Show it to the witness.

Mr. Mathews: I think the attendance is the evidence from one of the witnesses.

Q. Do you recall that the Mayor was there? A. Yes.

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Q. Mr. Michael F. Loughman, President of the Borough of Manhattan? A. Yes.

Q. Mr. Edward Riegelmann, President of the Borough of Brooklyn? A. I am not so certain that Mr. Riegelmann was there at 10:30. The attendance may have been made up. If a member were late his appearance may have been entered after he came in.

Q. Mr. William J. Flynn, representing the Borough of the Bronx? A. Yes, Flynn was there.

Q. Maurice E. Connolly? A. Connolly was
2105 there, yes.

Q. President of the Borough of Queens? A. Yes, he was there.

Q. Frank X. Sullivan, representing Queens? A. I do not recall whether Sullivan was there present at that time. He may have been present somewhat later in the morning.

Q. John F. Bowe, President of Richmond Borough? A. Yes, Bowe was present.

Q. You presided? A. Yes.

Q. How long after you entered the conference room or the committee room was it that Mr. Van
2106 Valkenburg brought the letter in to you? A. Within less than fifteen minutes.

Q. Do you recall what business was transacted before he came in? A. I do not know that I could state specifically as to what was transacted before he came in, because there are a number of matters under consideration at the same time. We may hold an item for ten minutes while an examination is being made in order to obtain additional information, and while that is being done we can dispose of half a dozen others.

Q. Do you have a stenographer present at the sessions of the Budget Committee? A. Yes.

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Q. Was one present on that day? A. Yes.

Mr. Mooney: I think the stenographer was examined as a Government's witness.

Mr. Mathews: He was.

Q. Now, I show you Government's Exhibit 14 for identification, and ask you if it is not a fact that the letter was read before any business, whatever. was transacted? A. No, it is not a fact.

Q. And before the stenographer came in? A. No, it is not a fact.

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Q. Was the stenographer there when that letter was read? A. Yes, sir.

Q. You are certain of that? A. Yes, sir, quite certain.

The Court: Such a communication would not be a part of the official record anyway.

A. No, and I think probably you may be mislead. The stenographer does not take everything that transpires.

Q. Let me see if I have what the stenographer's duties generally are in there: He goes in there and takes such notes as he thinks proper to make, giving a general outline of the proceedings, but then when definite action is taken by the Committee, it is dictated to him and he makes a note of that, and that is the official minute of the proceeding with respect to the action of the Committee, isn't it? A. Not exactly. The stenographer takes in his own way the record of the action. Now, if there is discussion upon a subject, where there seems to be a difference of opinion, or if anybody is heard, there is a hearing, why then he is presumed to take the

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2110 entire discussion, particularly of the hearing, and if a subject, without anybody applying for a hearing, develops a marked difference of opinion in the Board, the discussion is taken, but an ordinary discussion which results in no difference of opinion is not taken; and he takes the result when it is agreed upon and sometimes with supplemental suggestion or condition added.

Then there is what you might call in newspaper parlance, "the boil down," which is a mere summary of the results. That is prepared for immediate dis-
2111 tribution among the members of the Committee on the following morning. But the detailed discussion and the detailed items are not written up by the stenographer sometimes until some time afterwards.

Q. What does the stenographer's minutes show for that day? A. You mean this calendar you have?

Q. Yes, October 6th. A. I saw it some time ago, not so lately.

Q. I don't mean the copy I have. The more extended minutes? A. I saw it about a month ago.

Q. Don't you recall that there is no reference in
2112 that copy of the extended minutes to the letter? A. I know there is none. There wouldn't ordinarily be any. It is not an item of the Budget or anything that goes into the Budget.

Q. It had nothing to do with the business of the Committee? A. It is not an item in the Budget or that could ever get into the Budget.

Q. It is something with which the Budget's Committee had nothing to do as such? A. As a Committee, but concerned the members of the Board of Estimate and Apportionment who happened to be there in different capacities as committeemen.

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Q. You say the original letter was handed to you and a sheet remained in Mr. Van Valkenburg's hand, and you asked him to read it, which he did. Now, after he read it you say there was some discussion lasting about two minutes? A. Not more than that.

Q. Will you tell me what the discussion was? What did the Mayor say, for instance? Let us take them up, one by one. Do you recall what he said? A. I don't recall the particular words the Mayor used. But, it was to the effect that it was a good letter to send Nixon.

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Q. What else did he say? A. I don't recall anything in particular.

Q. Do you recall that the Mayor said that such a letter, in his opinion, would be in contempt of court? A. The Mayor didn't say any such a thing.

Q. Did any one present make any such statement? A. No one present made any such statement.

Q. Can you recall anything further that the Mayor did say? A. Further than what?

Q. What is that? A. Further than what?

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Q. Than what you have already indicated, that it was a good letter? A. That was the concensus of opinion. You will bear in mind the tenor and purpose of this letter was to get the municipal authorities, that is, the Board of Estimate and Apportionment and the Comptroller on the same footing as to information that they had sought to get on when the receivership was first instituted and the whole tenor and purpose of the letter to Nixon was to that effect. Because of that, and because they were not afforded access, it was a matter that should be brought to their attention to see whether or not there was any dissent in the Board.

2116 There was not. On the contrary there was a general chorus, I might say, of approval.

Q. Did you say anything further than you have already indicated? A. Nothing further than I have already indicated other than the direction I gave to Mr. VanValkenburg to transmit it.

Q. Did any one say, in substance, that the letter, if sent, would constitute contempt of court? A. No one did.

Q. Did any one say that in substance? A. No one said it in substance or in any manner, shape or
2117 form, or implied it or suggested it, or inferred it.

Q. That applies to each of those who were present at that meeting, namely, Mr. Loughman, Mr. Riegelmann, Mr. Connolly, Mr. Sullivan and Mr. Bowe? A. That applies to each and every one who was present?

Q. Do you recall any specific thing said by any particular member of the Board—do you recall, for instance, what Mr. Loughman said, if anything? A. At the moment I do not believe I can.

Q. Or what Mr. Riegelmann said, if he was present? A. I am not certain that Riegelmann was
2118 present at that time.

Q. Or Mr. Flinn? A. No more than a general expression of approval. Anyhow, not the particular words that were used. I did not charge my memory with that. I was busy signing the letter and I was listening with my ears, and signing with my hand, and looking with my eyes.

Q. Do you recall what Mr. Connolly said? A. Not particularly., Connolly usually makes some fly remark of some kind, but I don't know what kind of fly remark he made that day, if any.

Q. Did he say anything about the letter being in contempt of court? A. No.

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Q. Did any one else say that the same thing had been running through his head? A. What do you mean by the same thing?

Q. I am referring back to the contempt of court matter. A. No. I have answered that four or five times. I will answer it as many more as you wish, but I can't make it any clearer than I have.

Q. Do you recall anything Mr. Sullivan said? A. I am not certain that Sullivan was present. My impression would be to the contrary.

Q. Do you recall whether Mr. Bowe made any remark— A. Sullivan and Connolly are there as 2120
associates, you know. One is a substitute for the other.

Q. I notice in this that Queens is represented twice— A. The two representations only gives them one vote.

Q. I guess that applies to the vote on the letter as well as to other matters. Do you recall anything that Mr. Bowe said? A. No. not in particular.

Q. I understand that no further reference was made to the letter in your presence, or by you, or by any person until the luncheon hour? A. That 2121
is correct.

Q. Do you recall seeing Mr. Kerrigan that morning at all before you went to lunch? A. No.

Q. Do you recall that you didn't see him, or that you cannot recall seeing him? A. My impression is that I did not see him.

Q. The stenographer testified that the Committee adjourned at about 1:25 for lunch. Does that conform to your recollection? A. Somewhere along there.

Q. And resumed at 2:30? A. I think that may

2122 be recorded in the minutes. A thing of that kind ordinarily would be.

Q. It is marked in pencil at the top of the minutes, and the stenographer testified that that was made about that time. A. That is correct, about.

Q. Do you recall going to lunch with Mr. Kerrigan? A. Yes.

Q. When was it he first spoke to you, or you first spoke to him about that letter? A. On the way to lunch.

2123 Q. As you were leaving the building? A. Well, we were leaving the building from the moment the door opens in the Committee room. We were then in the public corridor.

Q. What I am trying to get at is: Was it almost immediately after you joined him, or was it later? A. It only takes five or six minutes to get from the door of the committee room to Haan's restaurant, if you walk along, so that it might have been anywhere along there. Whether it was mentioned when we were in the corridor or before we got into the elevator, or in the elevator, or on the street, I

2124 cannot tax my memory to state. Because he had a great many things to look after, and so did I, and often times at those adjournment questions have come up, or are brought up.

Q. What did he say to you about the letter, or what did you say to him? A. I do not think I said anything to him at all.

Q. What did he say to you? A. He referred to the fact that there had been a request there for the letter from the reporters, and that he had furnished copies to them.

Q. What else was said? A. I don't recall, at the

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moment. If you can suggest anything to me as a reminder it might refresh my recollection.

Q. What did you say to him, if you recall? A. I don't think I said very much. There is not much left of me to talk after I have been in session with that Finance and Budget Committee for four hours and appropriated a hundred and twenty-five million dollars of public money. I am ready then for other people to do the talking.

Q. Then I take it that it was about one thirty that Mr. Kerrigan reported to you that he had given copies to the newspapers? A. It was later than 2126
that. You say, yourself, the Committee didn't adjourn until 1:35.

Q. 1:25. A. Was it 1:25?

Q. Yes. A. The process of getting out of the room will take from five to eight minutes. Somebody always stops the Comptroller and gets between him and the door to hold him up on something so I cannot get out, so I did not get out of there—

Q. It was before you sat down to lunch, anyway? A. Yes.

Q. Then you had lunch and immediately went 2127
back to your office? A. Yes.

Q. After lunch? A. Yes.

Q. Was anything further said about it at lunch or after lunch? A. I don't recall anything further in particular.

Q. Do you recall anything further that you said to Mr. Kerrigan? A. I think I may have told him that Commissioner Delaney had called me up at the meeting and had told me that Nixon had read that letter over there.

Q. Had Commissioner Delany called you up? A. Yes.

2128

Q. What did you say to Commissioner Delany, and what did he say to you? A. He told me that Nixon had read that letter over there to the crowd of railroad attorneys that he had received from me, and that there was a good deal of feeling provoked by it, and that the conference had been adjourned.

Q. What time was that? A. I should say about 11:30.

Q. Where were you when you got that telephone message? A. I was presiding as Chairman of the Committee on Finance and Budget.

2129 Q. Did you leave your seat to answer the telephone? A. No, the telephone is right at my hand.

Q. What did you say then to Mr. Delany about it? A. I didn't say anything. I said yes. thanks, good-bye.

Q. Is that all you said? A. Yes.

Q. And that is all he said to you? A. No. I told you in substance what he said to me.

Q. I mean, what you have already stated. There is nothing further he said to you? A. Nothing in substance.

Q. He told you, didn't he, that the meeting up
2130 there was a closed session when the letter was read? A. No. I don't think he told me that. He knew I was in a Committee, and knew I was there when I had this conversation, and he made his conversation as short as he could. It was just a thing which I suppose he thought I ought to know. I thanked him and said, good-bye. I don't think I even made any observation.

Q. Did anybody talk to you about the reading of the letter before you went to lunch? A. No.

Q. Only Commissioner Delany? A. That is all.

Q. You say that was about 11:30? A. About that time.

2131

Q. Did you go back into the meeting of the Budget Committee at about 2:30 after you got back from lunch? A. Yes.

Q. The minutes show 2:30. Does that conform to your recollection? A. Yes. There is a peculiar, a particular reason for remembering that day. We had that day a very large gathering there in regard to other hearings on the appropriations for charities, charitable institutions, and the room was packed and the people were standing all around the wall in each others way.

2132

Q. You are familiar with the method of transmitting intelligence around the City, as Mr. Mooney said, and have been for a good many years, haven't you Mr. Craig, familiar with newspaper reporters and the methods of newspapers? A. I have something of an idea—

Q. You are familiar with the methods of the City News Association? A. I have some knowledge of it.

Q. And have had, for some time, haven't you? A. Always, more or less. I don't attempt to keep in touch with whatever changes they make in their procedure from time to time. I would not attempt

2133

to qualify as an expert on how news is gathered and distributed.

Q. You have often had occasion to give out matter to newspaper men for publication, haven't you? A. Well, I have often had newspaper men come in and ask me questions and on many occasions I have answered those orally. And many times where the matter was a little complicated I have dictated a statement for them and occasionally I have dictated matters which I thought were of unusual public interest for publication in the form of a public statement. I know that inquiries are being

2134

constantly made to the Department, many of which never reach me at all, in relation to matters which the reporters may think have a news value.

Q. And as to this letter, I think you told Mr. Mooney, that you knew when you signed it, that it thereupon became an official matter, in the sense that it was a matter that was bound to become public sooner or later? A. Oh, I know that, as I knew it of everything that I put my name to. It is public property the moment I put my name to it; even if it never leaves my desk, it is subject to

2135 inspection right there.

Q. Now, Mr. Craig, let me ask you, if it was not a fact, as you read this letter now, that it is not designed for the purpose that you have testified on your direct examination of giving Mr. Nixon certain suggestions for his private use in bringing about certain matters, but was designed by you when you wrote it, for public consumption? A. I don't see how you could any more effectually design it for the purpose I have described than I did. I would be glad to have any suggestion from you, at any time, because I would like to see Nixon do

2136 the job even yet.

Q. The job you intended to have Nixon do—apparently, as I understand your testimony—and I want you to correct me if I am not correct—was to bring about access to original sources of information which you were anxious to get. Is that right? A. Nixon had—

Q. Wait a minute. Is that right? Is that what you wanted Mr. Nixon to do, to use his efforts to bring about access to original sources, which you have explained and described? A. Shall I have to answer that yes or no?

2137

Q. I would like to have you, if you can. A. It cannot be answered yes or no. I will explain it to you, if your Honor please.

Q. All right, go ahead and explain it. A. To my mind, Nixon was acting out of his sphere. I had no desire to express any wish to him, or have him do anything whatever. But he had injected himself into a situation where, as he says in his letter to me of October 3rd, which I received on the 6th, "That he was being forced into the calling of this conference and that there must be negotiations and that the last word was with the City 2138
of New York, the Municipal authorities" and in the light of that condition it semed to me that if Nixon was to serve any useful purpose whatever, it could only be in the direction of laying the foundation for a conference that could be held and out of which some results could flow, and that any effort in any other direction would be abortive and not only a nuisance to everybody else, but would only prolong the transportation difficulties.

Mr. Mooney: I think the words quoted from the letter should be concessions, not 2139
negotiations.

A. He said there must be negotiations. If I may have the letter a minute.

Mr. Mooney: Was that a slip of the tongue? You have been testifying with the letter in front of you now.

A. Yes, the letter of October 3rd.

Mr. Mooney: I think you will find it is "concessions" not "negotiations."

2140 A. His words are "There must be negotiations," and then, in another part he says—the whole paragraph there is "We cannot hope to get the full measure of concessions in advance. There must be negotiations." Then he concludes, "the final word is with the City government as to the sufficiency of concessions." He asked us to come over there without any sufficient equipment as to facts and investigation and to give the last word, which seemed to me an impossible thing to expect anybody to do. I made him the only suggestion that
2141 I thought then, or have thought since, and I have not heard anybody give any better, or to point any other way out.

Q. Am I right in saying: That way was to secure a reversal of the policy of denying access to original sources of information, as you said a moment before had been— A. If you will hand me the letter I will show you to what I am referring. That way that was expressed in the last paragraph of the letter: "As a first and preliminary evidence of good faith, those who desire such a conference and a reasonable solution of existing complica-
2142 tions, should procure the entry of orders by Judge Mayer putting the City of New York on an equal footing with the private interests active in the receiverships. A. refusal to do this can but prolong and embitter the controversy; and it will not, in the end, procure any advantage, whatever, to the traction interests." That is preceded by the concluding part of the paragraph ahead of it, or rather the whole paragraph: "The responsibility for the turmoil, delay, and dissatisfaction that has followed upon the Orders of Judge Mayer, denying to the City of New York any representation in these

2143

receiverships rests upon those who procured and are protected by such orders." I don't know how to use the English language to convey that idea with any more conciseness or forceableness to such a mind as Mr. Nixon's than I have there employed.

Q. As I interpret your testimony—I want you to correct me if I am not fair in my interpretation—the only way of putting the City on an equal footing was for a co-receiver representing the City to be appointed? A. Yes.

Q. And the sum and substance of this letter to Mr. Nixon was, that the City will do nothing unless the Court appoints a co-receiver. Is that right? A. No. That is not the sum and substance of that letter. 2144

Q. Very well, if it is not. That is enough. I won't go any further. Did you make any effort, whatever, to kill—using the vernacular—the letter that had been given to the press by Mr. Kerrigan? A. I had no power to kill it.

Q. Did you try to kill it? A. I did not lift a finger one way or the other. I know from Mr. Delany over the telephone, as early as 11:30, that Nixon had read the letter to a conference of traction attorneys, and that it was then and there public property, and that he had frustrated the whole purpose for which the letter was written. 2145

Mr. Mathews: That is all.

By the Court:

Q. Let me ask you just one or two questions, very briefly. If I correctly gathered from what you say, your recollection is not very clear as to whether you saw the Court's order or memorandum

2146 of September 6th, 1919? A. My only uncertainty is as to whether I had seen it on or prior to October 6th.

Q. That is what I am getting at. You are not sure whether you did see it before October 6th? A. No.

Q. Well, now, as that leaves the time uncertain when you had seen it, are you sure you read it? A. Yes, I read it.

Q. And you read the clause, or sentence, to which attention has been called: That the receivers
2147 were making clear that every facility will be used to satisfy themselves in respect of the actual financial and other conditions in relation to the corporations now in their official charge? A. Yes, I read that.

Q. Now, did you have the impression that the Court would, if an application were made to inquire into the actual financial and other conditions referred to, did you have the impression that the Court would fail to assert all its power to see that you, in your official capacity, or any member of the Board of Estimate and Apportionment would
2148 have been the same access that the Court itself would have? A. Well, I had in mind that Governor Hughes was conducting some kind of an inquiry about that time for some people and this situation would cover him. I also had in mind this: That it was my judgment then, as it is now, for that matter, that no effectual opening up of the material facts in regard to these various contractual relations and the question of capitalization, that little can be ascertained except upon the most rigorous inquisition by a person in authority and control over those who have the actual physical cus-

2149

tody of these records; and that as a matter of fact that if any public officers were to attempt to do that, in the face of the outstanding restraining orders of a general character—that the moment they indicated the particular objective of their inquiry, it would be frustrated by the withdrawal of those records even from the Receivers themselves, probably in most cases without any personal knowledge on the part of the Receiver, so that, to my mind, the only effectual disclosure would be effected by a Receiver who will apply to that disclosure such vigor, such inquisition and such discipline over those in custody of the records that he is sure that everything would be forthcoming, and that anybody who stood in the way would be put out of the way.

2150

.Q Then, as I gather, you had, no doubt, in your mind, or no question as to the good faith of the Court? A. I hadn't any question in my mind that the Court meant what it said in that memorandum, but I had a very distinct opinion as to the effectiveness of that kind of action.

Q. That is what I was going to ask you. You had no question in your mind, I gather, as to the good faith of the Court and the desire of the Court that the fullest facility should be afforded. But, from your point of view, you did doubt that the desire of the Court could be made effective in ascertaining the facts with which you thought you ought to be acquainted, unless you, or some other representative of the City, was the receiver? A. It was a question of practicability in a given matter. Now, I have never had any doubt that the persons who were embraced in this description and the Court's memorandum would get such informa

2151

2152 tion as they called for, or access to such books as they called for, and would receive such aid from the Receivers and their subordinates as might be necessary to get what was called for; but that falls short, in my judgment, of the effective kind of relief that the City of New York must have in order to tap these things absolutely at their sources.

Q. What I am trying to get at is: Whatever may have been your opinion as to the practicability of an inquiry undertaken on the invitation of the Court through its receivers in these proceedings,
2153 do I understand correctly, that you at no time questioned in your mind the good faith of the Court in offering that? A. I never had any doubt that the Court thought that would give all the information anybody asked for, but I did have a very distinct opinion of my own that it did not reach the situation so far as the City of New York is concerned and the city has the most extensive interests by all odds of anybody to the controversy, both on the financial side as well as on the public's side.

Q. Did you know on October 6th from any other
2154 members of the Board of Estimate and Apportionment as to whether they had received this paper, Exhibit 26? A. My recollection is that that matter had not come to my attention at that time, except in some cursory way in the newspapers, and that I had had no opportunity to examine it closely or discuss it with anybody else. I want to add this, that in any event, the mere report of Stone & Webster would not reach the situation that the Municipal authorities had to deal with.

Q. I understand that perfectly. All I want to know is whether your recollection served you as to

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whether you had been informed by any member of the Board of Estimate and Apportionment on or prior to October 6th that such other member of the Board of Estimate had received this letter, Exhibit 26? A. My recollection would be all against that.

Q. And also is it your recollection whether any other member of the Board of Estimate discussed with you in any manner the subject matter of Exhibit 26? A. I am certain there was no discussion about it prior to that time.

2156

The Court: Very good.

Re-direct Examination by Mr. Mooney:

Q. One question: You were asked a question as to the excitement and turmoil. Have you had a compendium prepared under your own supervision of communications received by the Board of Estimate and Apportionment, communications received by the Comptroller, communications received by the Mayor and publications of the press of the City of New York all relative to this question of turmoil and excitement? A. Yes. 2157

Q. And is this that compendium (exhibiting same to witness)? A. Yes, it is.

Mr. Mooney: I offer this in evidence.

Mr. Mathews: May I see it?

The Court: There is just one other question, in view of some questions I asked Mr. Kerrigan, and that is whether in regard to sending matter to the newspapers in the manner, the method that has been described, and you are probably familiar with it, of

2158 having what they call flimsy copies made, and sent over to room 9 in the City Hall, whether Mr. Kerrigan had to receive from you any general authority, or whether his acts in such regard, could take place, in your relations with him, you, as the head of the Department, unless you specifically authorized it?

A. Why, that is a matter that is within the scope of the duties of the Secretary of the Department.
2159 It proceeds, in the first instance, upon this basis: That everything that is in the Finance Department is public property for anybody who wants it, and we very commonly make copies for people—that is, not newspapers only, but for any citizen that wants a copy of a document, although it may be very extended. We do that very commonly without making any charge. Sometimes it is so great that we have to make a charge, or charge a fee, under the statute; that being so, that is, everything being public property, it has always been the custom, long anterior to my time, for the Secretary
2160 of the Department of Finance to furnish additional copies of anything he saw fit or had any request for to the press for publication. The only restraint or limitation I know of on that is in regard to matters between the Comptroller and the Corporation Counsel, which are excepted by the statute, as being open to the public. So that only on very unusual occasions, when Mr. Kerrigan, or whoever may be the Secretary, has doubts as to something contained in the statement that is being sent out, as to whether it is justified or not, will he bring it to me; but so long as it is a mere copy of a

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record or proceeding in the Department, or of any report of any kind, of which I sign hundreds and thousands in the course of the year, they will never require any permission of mine, and I would not have any power, or exercise any restraint over it. They are all accessible to someone, and the reporters know this, so as a mere matter of accommodation it has been the practice of the Finance Department for a great many years, even before I was Comptroller, for the Secretary to furnish these copies, sometimes on his own initiative, and sometimes upon request. In this particular instance, as 2162
I recall it very clearly, when Delany called me on the telephone about 11:30, I knew, of course, that Mr. Nixon had made this letter public property; and it didn't raise any question in my mind at all, and when Mr. Kerrigan told me during the lunch hour that he had, at the request of somebody—I think it was Breen, of the Evening World—sent copies over to the reporters' room, because whether he sends it to them or whether they got them through Nixon was absolutely immaterial, it didn't affect me in the slightest and I didn't care one way or the other. That is the reason there was no 2163
particular conversation about it, even when he told me what had transpired.

The Court: In other words—

A. I am accustomed—I may add this—I am accustomed every day to seeing things in the newspapers and hearing of things that are about to be in the newspapers, over which I haven't any control of any kind, but that if I did have any control, I would like to see presented in a very much dif-

2164

ferent fashion. I am not a publisher of newspapers and don't make any claim in any sense of knowing what is good news, or news that is not so good. That is left entirely to the reporters and the publishers.

Q. And when you use the expression "care," do you mean by that you were not in a position to exercise any care or responsibility other than what you had already done in transmitting this in its regular course? A. I meant that there was nothing for me to do either one way or the other. Noth-
2165 ing that I could do that would affect it in any part or detail, in any direction. So there being no action I could take of any kind, I dismissed the matter from my mind forthwith.

Q. You did not use the words, "I did not care" in the sense of recklessness, but in the sense that it was a finished thing? A. In the sense that there was nothing requiring any action on my part and, therefore, I did not need to charge my mind with it.

The Court: I think I understand. Put-
2166 ting it in another way: The moment the letter was signed and filed in the office of the Comptroller, or a copy of it filed, it then automatically became a public record and then the Secretary can either give it out on his own motion, or at the request of somebody in accordance with settled practice and routine.

A. Yes. Procedure established for years.

Q. Now, when you speak of Mr. Kerrigan as the Secretary of the Department—in answer to these recent questions—does he do that entirely upon his own responsibility? A. Yes, on his own initia-

tive. In fact, that morning, Mr. Kerrigan had arrived late, as he has on one or two other occasions, and I did not see him before I went into the committee room. 2167

Q. Have you, since you became Comptroller of the City of New York, given any directions, whatever, touching upon or relating to this custom which was established, or had been established, in that office, as you have described it? A. No, only in so far as I have a kind of general requirement, even if not explicitly expressed, that I should never be quoted upon anything, unless I myself authorized the statement. Of course, if I have already signed a document, that is the end of that. Anybody is at liberty to make any extract from that that he sees fit. 2168

Mr. Mooney: This compendium is marked—

Mr. Mathews: The compendium is objected to, except as showing the matters therein stated are either complaints or letters received by the Board of Estimate, or the Comptroller, or the Mayor, or references to articles that appeared in the press and not as to the facts stated in any of the communications, or as to the facts reported in any of the press articles. 2169

The Court: I understand.

Mr. Mooney: That is substantially the limitation with which it is offered, simply to give a general idea of what the witness's examination relates to and to save time.

The Court: I will take it as being a compendium of matters showing public interest

at the time, and, of course, not as evidence of the truth of the matters therein set forth.

Mr. Mathews: And may it be understood that the Government may supplement that portion of this compendium by additions to it of matter relating to publications in the press, if it sees fit. I don't know that we shall want to.

Mr. Mooney: That is quite agreeable to me.

2171 The Court: Very good.

Mr. Mooney: In fact, I may say that the publications in the press here have been presented without any selection whatever, and have animadverted upon the action of the defendant with equal freedom to that shown others.

Compendium marked Defendant's Exhibit V.

2172 GEORGE T. VANVALKENBURG, recalled, on behalf of the defendant, testifies as follows:

Direct Examination by Mr. Mooney:

Q. Mr. VanValkenburg, when the letter of the Comptroller, about which you have already been examined in this proceeding, was typewritten and struck off by you, will you state whether there were any carbons struck off with it and what the form of the carbon was? A. One yellow carbon.

Q. And is there a practice in the Comptroller's office with respect to carbon sheets for these communications that are intended for office use, and a

2173

separate system with respect to those communications which are expected to be published? A. Yes, sir.

Q. What is the difference? A. Well, if one is to be published, I am asked to make a number of flimsy copies, and that goes on what we call report paper.

Q. And that is white paper? A. That is white paper.

Q. Was there any sets of flimsy or white paper such as you have described used on this occasion in connection with this letter? A. No, sir.

2174

Q. And were any of those flimsy or white papers struck off until after the communication had left the office on its way to Commissioner Nixon? A. Yes, after that.

Q. And these flimsies or white sheets of paper, are they substantially of the size of legal cap? A. Yes, sir.

Q. As distinguished from the square or nearly square size of the letter and the accompanying yellow carbon? A. Yes, sir.

Mr. Mooney: That is all.

2175

Cross Examination by Mr. Mathews:

Q. Do I understand you to mean by your testimony that invariably when a letter is given to the press it is originally put on this legal cap size? A. I don't understand your question, Mr. Mathews.

Q. You said there was a practice. I am now asking you whether that practice was invariable, that when a letter was to be given to the press its original transcript by you, when you write it from your

2176 notes, would be placed on legal cap sheets? A. Yes.

Q. It would invariably? A. Yes.

Q. Has there ever been an occasion when a letter originally written on sheets of this size, referring now to Government's Exhibit 2, was thereafter copied on legal cap sheets and those sheets given to the press? A. Yes, sir.

Q. Has that happened on more than one occasion? A. Yes, sir.

Q. About how many times has that occurred?
2177 A. Well, I could not say.

Q. A good many times? A. Well, when that is wanted, I am generally directed to see that there is, and probably I am told that a number of copies are to be given out to the press. I then write it on the long sheets of paper with the flimsy copies, on legal cap size paper.

Q. Have you here in court the carbon sheet, the yellow sheet made at the time you wrote out Exhibit No. 2? A. No, sir.

Mr. Mathews: Are they here, Mr.
2178 Mooney?

Mr. Mooney: I don't think they are, but we will gladly produce them if we can.

Q. You recall making a single carbon? A. Oh, yes, I do.

Q. And instead of filing that, you gave it to Mr. Kerrigan? A. I handed it to Mr. Kerrigan, yes.

Q. And he gave it back to you and asked you to have the usual flimsy copies made up for the press? A. I don't think he gave it back to me to have those copies made. I think it was handed to one of the typewriters to make the usual copies.

Q. But you knew that the flimsies were made?
A. I knew they were being made, yes.

The Court: Your handing the letter to Mr. Kerrigan was the usual routine, was it?

A. Not always, no. It was an interesting letter, and I simply handed it to Mr. Kerrigan and I said, "Here is an interesting letter." There are thousands—I won't say thousands, but many hundreds of letters I write, with simply the yellow copy, and I never show them to Mr. Kerrigan, because that is 2180
in the regular general routine business. But this one was an exceptional communication. I thought it would be interesting to him as Secretary to the Department of Finance.

Mr. Mooney: That is all.
Mr. Mathews: That is all.
The Court: The defendant rests?
Mr. Mooney: With one exception. Do you wish to have Mr. Van Valkenburg search and find the exact carbon copy of this paper? 2181
Mr. Mathews: Yes.
Mr. Mooney: I am expecting, in that connection, however, that the case will not be kept open more than nominally, as I am attempting to go into another engagement.

I would like to have considered as part of the record in this case, the memornadum, or decision of Judge Mayer, dated December 27th, 1919. The object and purpose of offering it being, that while it is dated after the letter, it states or reflects conditions that ex

2182 isted at the time of the writing of that letter. That is your Honor's memorandum.

The Court: I see no objection to that.

Mr. Matthews: I think it is really immaterial. We haven't gone at all beyond the date specified in the information and I would prefer to limit it to that date. I haven't read this recently, and it is probable that I wouldn't have any objection to it.

The Court: I am very familiar with it and while I have held strictly to the 6th of October, I presume that the purpose of

2183 Counsel is to show an outline of the general so-called traction situation, as the Court has outlined it, which situation was in effect on October 6th. That I assume is the sole purpose.

Mr. Mooney: That is, in substance.

The Court: In other words, if it should become a matter of any discussion, then instead of being compelled to go to other sources you have the Court's own outline of what it considered was the so-called transit situation.

2184 Mr. Mooney: That is the object of the offer.

The Court: With the limitations indicated I will receive it.

Received and Marked Defendant's Exhibit W.

The Court: Let the briefs be exchanged on the first Tuesday of September, and then let each side have ten days thereafter within which to serve a memorandum, if so advised, and a strict reply, not to go over the ground again, but just in the event that any of the briefs deal with some point not considered

by the other party, and then I will take the 2185
briefs—the seventh of September, and the parties will exchange on Saturday, the 18th, and we will make it—lay the briefs on my desk together with the record on the 20th day of September. That will give everybody a full opportunity. I have no desire to press any counsel during vacation.

Whereupon an adjournment was taken to June 10th, 1920, at 10:30 a. m.

2186

New York, June 10, 1920.

Trial resumed pursuant to adjournment.

PRESENT—The Court and Counsel, same as before.

Mr. Wolbarst: I renew the motions made at the close of the Government's case, particularly the motion to dismiss on the grounds then stated, and on the additional ground that the evidence affirmatively establishes that the defendant was not guilty 2187
of a contempt in writing the letter of October 6, 1919.

The Court: Decision reserved, with an exception noted on behalf of the defendant to the denial of each and every motion on the grounds of the motion.

2188 UNITED STATES DISTRICT COURT.

Before—MAYER, Judge.

UNITED STATES

vs.

CRAIG.

New York, February 24, 1921. 2 P. M.

2189 APPEARANCES:

For the United States: FRANCIS G. CAFFEY, United States Attorney.
DAVID V. CAHILL, of Counsel.
For the Defendant: EDMUND L. MOONEY, Esq.
RUSSELL LORD TARBOX, Esq., of Counsel.
CHARLES T. B. ROWE, Esq., of Counsel.

Colonel Caffey: In this case, if your Honor please, the defendant has been convicted of contempt. I now move for sentence.

Mr. Mooney: We have nothing to say, your Hon-
2190 or, further than has been said. We wish to say only, and this is repetition, that there has not been, and is not, any intention on the part of the defendant to commit any contempt against this Court. That has been so repeatedly said throughout the proceedings that I am sure I can add nothing to it by repetition.

The Court: The sentence of the Court is that the defendant be confined in the Essex County Jail in Newark, New Jersey, for sixty days.

The Clerk: Marshal, will you take the defendant in custody, please.

GOVERNMENT'S EXHIBITS ON CONTEMPT TRIAL. 2191

Government's Exhibit 1.

October
First
1919

Hon. Charles L. Craig,
Comptroller and Member of the Board
of Estimate and Apportionment,
Municipal Building,
New York, N. Y. 2192

Sir:

As an outcome of to-day's hearing on the separation of lines from the New York Railways Company, I feel that it is my duty to invite you to attend a conference of all parties at interest in the transit situation.

My position since taking office has been that in case any concessions were granted by the City that concessions in return should be made by the Companies, such concessions to be of a nature that will induce the City Government to grant relief. 2193

We are face to face, not only with vast losses to the people of the City, but with lowering of the standard of service, physical deterioration of property and equipment and demoralization of organization.

Had the matter received constructive and businesslike handling four months ago the present crises could have been avoided and the great system of free transfers saved to the traveling public.

For temporary concessions extended to the companies great and lasting benefits could have been secured to the people of the City.

2194

Efficient transportation is the life of our industrial and commercial enterprises. The disintegration already precipitated will lead to expense, inconvenience and confusion for the traveling public and almost insurmountable difficulties in regulation. And even worse is to come.

No one surely will assume the fearful responsibility of refusing to aid in mending this condition. The people of the City deserve better treatment as burdens are being fastened upon them that it will take many years to lift and some time even to

2195 lighten.

I suggest a preliminary meeting at the offices of the Commission next Monday morning at ten-thirty o'clock.

The traction companies I beg to take counsel and present such plans as they think will prevent further collapse and that will in addition weld together the parted units, to the end that cooperation may be secured to at least as full an extent as existed before the receiverships began. They must be prepared to make drastic concessions for any favors received.

2196 To the City, through the Board of Estimate and Apportionment, a plea is made for a sincere participation in this conference (either in their individual official capacities, as a Board, or through a representative with power) which should secure advantages to the people.

A general readjustment, fair to all, can only be secured by a round-the-table discussion leading up to negotiation. The City holds the whiphand in the matter as the companies seek concessions.

Each side believes in the integrity of its claims, but human nature is such that it seems futile to

2197

expect the limit of concession to be stated by either unless satisfied of the earnest desire of the other to secure an agreement.

It may be necessary to review figures and examine leases and agreements that will consume time, but no further time should be lost in starting to secure a meeting of minds on this vital subject.

Very respectfully,

LEWIS NIXON,
Commissioner.

2198

Government's Exhibit 2.

DEPARTMENT OF FINANCE

CITY OF NEW YORK

October 6, 1919.

CHARLES L. CRAIG,
Comptroller.

Hon. Lewis Nixon,
Public Service Commissioner,
No. 49 Lafayette Street,
New York City.

2199

Dear Sir:

Replying to your letter of October 1st:

Apparenty without inquiry and without information you have fixed the time for the proposed conference upon a date which, if observed, would require the members of the Finance and Budget Committee of the Board of Estimate and Apportionment (comprising the entire Board), to drop the preparation of the largest budget in the history

2200 of New York City, in which work, as you could easily have ascertained, they have been for some time and must continue to be engaged in daily sessions from early to late.

In your letter you say:

> "It may be necessary to review figures and examine leases and agreements that consume time."

Before any such conference can be seriously con-
2201 sidered, and as an evidence of good faith on the part of those acting by and under the authority of United States District Judge Mayer, there must be a reversal of the policy for which Judge Mayer is responsible, of denying to myself and other members of the Board of Estimate and Apportionment any access to original sources of information concerning the property and affairs of these various public utility corporations holding franchises to operate in the streets of New York.

When the applications were made to Judge Mayer in the "friendly" proceedings instituted by
2202 those interested in these corporations for the appointment of a Receiver of their own liking, if not of their own selection, the Corporation Counsel of The City of New York, acting under instructions from the Board of Estimate and Apportionment given at my instance, urged upon Judge Mayer that he appoint an additional or co-receiver acceptable to the Board of Estimate and Apportionment, to see that the facts and conditions of the corporations involved were fairly and fully presented to the United States District Court in the course of the receivership, so that any orders or decrees that might be made by the Court would be fair and just

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to The City of New York, and the members of the Board of Estimate and Apportionment might be accuratey informed with respect thereto in order that any action deemed necessary by the City might be taken.

As you must be aware, it is a very common thing in large receiverships to appoint additional receivers, particularly where they are varied and conflicting interests; and I have never been able to understand why in a matter of great public concern such as this, Judge Mayer set himself against it. It was clearly understood that conditions were certain to 2204
develop in these receiverships where the responsible authorities would be urged to take action which no honest or intelligent man could be expected to consider without the most exact and complete information upon the entire subject. Judge Mayer refused to grant any of the relief sought by the City. He not only denied the relief but he made orders which preclude any application being made by the municipal authorities to any other Court or Judge for my right of examination into the affairs or conditions of these corporations seeking municipal aid and favor.

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Truth is the mightiest weapon in every controversy. The orders of Judge Mayer deny to the municipal authorities the opportunity to ascertain the truth.

The franchises and rights enjoyed by these corporations were mostly all procured many years ago when corrupt political rings were in control of public affairs and the darkest scandals of municipal history, both in the old City of New York and in the City of Brooklyn prior to consolidation, are those in relation to such grants. The affairs of the franchise holding corporations have been in the

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hands of the boldest and most unscrupulous manipulators engaged in the exploitation of the rights obtained from corrupt political rings. Up to the present moment they have defied every power that has sought to open up the books and original records for search and examination in the public interest. They will open and open wide without any reservations or restrictions before there will be any conference so far as I am concerned.

It seems to me a monstrous thing that an order of a Federal Judge in a Court of Equity should
2207 stand between the public and the truth under such circumstances. Such an order is hostile to every interest of The City of New York in these controversies. Its operation and effect is to disarm the municipal authorities, to deny them the most effective instrument of redress, and to force into a contest with corporate powers entrenched in darkness and concealment.

The responsibility of the turmoil, delay and dissatisfaction that has followed upon the orders of Judge Mayer, denying to The City of New York any representation in these receiverships, rests
2208 upon those who procured and are protected by such orders.

As a first and preliminary evidence of good faith, those who desire such a conference and a reasonable solution of existing complications, should procure the entry of orders by Judge Mayer putting The City of New York on an equal footing with the private interests active in the receiverships. A refuse to do this can but prolong and embitter the controversy; and it will not in the end procure any advantage whatever to the traction interests.

Yours very truly,

(Sgd.) CHARLES L. CRAIG,
Comptroller.

DEFENDANT'S EXHIBITS ON CONTEMPT TRIAL. 2209

Defendant's Exhibit "A."

October 3rd, 1919.

Hon. Charles L. Craig,
Comptroller of The City of New York,
Municipal Building,
New York, N. Y.

My dear Mr. Comptroller:

I have been wishing for an opportunity to discuss matters with you, but owing to the intemperate 2210
attitude of the Mayor in connection with any act of mine, I have not asked for a conference as any talk with me might have excited violent dissatisfaction in certain quarters, and I dislike being a source of discord even in an official family.

Owing to certain facts that developed at the hearing of Wednesday I was practically forced to call the conference to which you are invited Monday.

We cannot hope to get the full measure of concessions in advance. There must be negotiations.

I trust you will agree with me that this is City's business of so vital a nature as to compel partici- 2211
pation.

The final word is with the City Government as to sufficiency of concessions.

While I am stated to act above the law surely in this case I am simply trying to adjust a situation that should not continue and one in which it is the duty of all charged with public trusts to aid.

With kind regards, I remain

Yours very truly,

LEWIS NIXON,
Commissioner.

2212 **Defendant's Exhibit "T."**

COMPENDIUM.

ABSTRACT OF TESTIMONY TAKEN IN THE INVESTIGATION OF THE INTERBOROUGH METROPOLITAN COMPANY AND THE BROOKLYN RAPID TRANSIT COMPANY BY THE PUBLIC SERVICE COMMISSION, FIRST DISTRICT, WILLIAM M. IVINS, EXAMINER, POPULARLY KNOWN AS THE IVINS INVESTIGATION.

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"The affairs of the franchise holding corporations have been in the hands of the boldest and most unscrupulous manipulators engaged in the exploitation of the rights obtained from corrupt political rings." (Letter Oct. 6, '19, by Comptroller Craig—See Information.)

Cost per mile of 34th Street Crosstown Railway underground trolley—$6,472,287.00 (pages 199).

Cost per mile of Fulton Street Road (Horse)—$2,553,097.00 (pages 199).

As compared with:

2214 Eighth Avenue Railroad Company, underground trolley, cost per mile—$166,143.00 (pages 199), and

Pelham Park Line (Horse)—$24,836.00 (pages 199).

Asked to explain how it was possible for a road to cost $6,472,287 per mile (referring to that of 34th Street Crosstown) for road and equipment, Shonts, who was President of the Interborough-Metropolitan Company, testified that he was not sufficiently acquainted with the past history to answer, and knew the roads only as he found them (page 200).

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Hedley, who was manager of the Interborough, testifying, admitted that the Interborough makes its largest profits during the rush hours when carrying the most standing passengers (page 250).

He also asserted that it was not a matter of common complaint that citizens cannot get seats during non-rush hours—(this was contrary to common knowledge)—and that no more than perhaps two or three complaints by citizens regarding inefficient service during non-rush hours had come to his attention (page 282).

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N. Y. City Railways Cos'. Statistics.

There appear in the Record (Vol. I, Ivins Investigat. inserted at or between pages 427-501) tables relating to each of the roads constituting the New York City Railway System, giving statistics year by year, showing the amount of the capital stock, funded debt, unfunded debt, cost of road and equipment, receipts, operating expenses, interest and taxes, dividends, passengers carried, length of road, cars and horses.

From these statistics, certain circumstances, among others, are deducible. The general deduction from the statistics is, that the financial matters of the roads were subjected to juggling, and watered; that the books were badly and imperfectly kept, and that information was on occasion either willfully suppressed or carelessly compiled. Thus the statistics show, taking two of the roads for example:

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(1) The cost of road and equipment of the *N. Y. & Harlem R. R. Co.* as shown by the June 30, 1904, report was $22,220,726.16, but although the road

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was then (1907) operated by underground trolley, the cost of the change does not appear in any of the Company's reports. The change was made by the lessee and presumably charged under "Additions and Betterments of Leased Lines."

(2) Sixth Avenue R. Co. (page 432).

In 1866 paid dividends which were not earned (pages 433-435).

In 1870 had funded debt of $250,000 and floating
2219 debt of $85,100, although it had added during the period from 1865, but about $200,000 for road and equipment (page 435).

In 1869 the cost of the road was given as reduced by about $270,000 without explanation (page 435).

In 1874 the floating debt increased without explanation, and only $75,000 was charged to construction and equipment. The Company paid the usual 10% dividend though not earned (page 435).

Up to 1876 (from 1873) the Company had increased its cost of road and equipment by $1,637,356, but the length of the road had increased only one-quarter of a mile, and it had increased its
2220 debt $1,244,000 (page 435).

Similar circumstances are shown in the summary as to the 8th Ave. R. R. (pages 459-460); the 9th Ave. R. R. (page 468); the Bleecker St. & Fulton Ferry R. Co. (page 470); 28th & 29th Sts. Crosstown R. Co., indication of "water" (page 478); 34th St. Crosstown R. Co. (page 483); Fulton St. R. Co. (pages 486-7)—indications of water; Westchester Electr. R. Co. (page 489); Tarrytown, White Plains & Mamaroneck R. R. (page 493); N. Y., Westch. & Conn. Tract. Co. (page 495); Yonkers Railr. Co. (pages 499-501).

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STEINWAY TUNNEL.

Interborough paid $402,000 for stock of N. Y. & L. I. R. R. Co. controlling the tunnel, the Company being incorporated for $100,000, and the money was paid to one John Pierce, supposed to be representing all the stockholders. Bryan, President of the Interborough, didn't know who the shareholders were at the time of the acquisition, where the money went, or whether it was paid by cash or check.

2222 In transfer tax proceedings on the Estate of William Steinway his holdings of 425 shares of the N. Y. & L. I. R. R. Co. stock, 75 shares less than one-half of the stock, were found first to be valueless, and later listed as having been sold for about $39,000 odd (though the I. R. T. paid Pierce $402,000 for the whole stock).

The Interborough Rapid Transit Company paid $7,785,579.05 for the "construction" of the Steinway tunnel (page 18).

Aug. Belmont and the I. R. T.'s $10,000,000 *Gold Note Issue.*

2223 This issue of June 30, 1905, was sold to August Belmont & Co. who received a discount thereon of $300,000, and in January 19, 1906, a discount of $150,000 on a second sale—in all $450,000—in addition to a three-quarters of a per cent. for doing business (page 649). Bryan, President of the Interborough Rapid Transit Company, said he was not familiar with the terms (page 647), but though not explaining it, or indicating the name of any person who could explain it, attempted to defend the charging of the $450,000 discount, and the commission paid to August Belmont & Co. for selling the

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notes as a proper charge against construction account (page 649).

August Belmont, whose firm received the above mentioned discounts or commissions personally, received a salary of $75,000 a year (average) from October 27, 1904 to February , 1907 (page 653).

Other Charges Against Construction Account.

$ 500 to National Civil Federation (page 652);
2225 $10,000 to McGraw Pub. Co. for publishing;
$ 3,471 a souvenir book (page 652);
$25,000 to Joseph S. Auerbach;
$25,000 to W. G. Oakman (page 653).

Auerbach and Oakman received this money for closing the Manhattan Company's lease, in no wise related to subway construction (page 657).

Mr. Ivins' contention was that these various amounts, including Belmont's $450,000 discount were charged to construction account so as to saddle it as a construction payment under the terms of the City's subway contracts, which would fall
2226 on the City, and also not to reduce the dividend paying capacity (page 657).

I. R. T.'s Books.

Edward F. J. Gaynor, I. R. T. auditor, testified the I. R. T.'s books had never been audited by anybody except the company's auditors, i. e. that there had never been an independent audit made (page 688).

The $402,035.17, which in the early stages of the Ivins Investigation it was asserted was paid to John Pierce, supposedly representing all the stock-

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holders who held shares in the New York & L. I. R. R. Co. which controlled the Steinway Tunnel, was according to the statement of Delancey Nicoll read into the record at page 695, 696, disbursed in detail as follows:

Date, December 31, 1903; Paid to Aug. Belmont & Co.; amount $33,894.75; Remarks, Cost of franchise, etc.

Date, March 8, 1904; Paid to John Pierce; Amount $250; Remarks, Cost of survey in Long Island City.

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Date, September 23, 1904; Paid to Aug. Belmont & Co.; Amount $54,100; Remarks, Refunding amount paid to John Pierce for assignment of Oliver W. Barnes' judgment against the N. Y. and L. I. Railroad Company.

Date, January 28, 1905; Paid to John F. Buck, Assistant Treasurer; Amount $50; Remarks, fees, Real Estate Committee.

Date, March 14, 1905; Paid to Alfred A. Gardner; Amount $98.05; Remarks, disbursements account of franchise N. Y. & L. I. Railroad Company.

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Date, July 8, 1905; Paid to Treasurer State of New York; Amount $5,000; Remarks, Permit for use of Man of War Reef.

Date, July 19, 1905; Paid to Edward Lauterbach; Amount $7,500; Remarks, Legal service, account of N. Y. & L. I. Railroad Company.

Date, August 1, 1905; Paid to Strong & Cadwalader; Amount $3,142.37; Remarks, Legal services and disbursements; account of N. Y. & L. I. Railroad Company.

Total $402,035.17 (Pages 695, 696) (Sum., 21, 22).

Payments aggregating $43,000 to Mr. Wickersham and to Nicoll, Anable & Lindsay, were charged

2230 to Equipment Account of the I. R. T. Co. (708 Sum., 22).

Subway Equipment Account of April 21, 1903, is charged with $28,644.03 for legal expenses to Rapid Transit Construction Company without anything on the face of the books to identify to whom these legal expenses were paid (709 Sum., 22).

April 5, 1904, Subway Equipment Account is charged with services of Strong & Cadwalader as general counsel $25,340.66. (709 Sum., 22).

D. C. Moorehead prior to February 14, 1902, the date of the execution of the lease between the
2231 Metropolitan and the Interurban was auditor of the Metropolitan Street Railway Company and after the lease became Secretary and Treasurer of the Metropolitan and auditor of the Interurban (757 Sum., 23), testified that 100 shares of stock which he did not own were put in to qualify him as a director of the Metropolitan, and that without any knowledge on the subject whatsoever he voted in favor of the lease for 999 years which turned over the entire Metropolitan Street Railway system to the Metropolitan Securities Company which owned a carbarn, three or four cars, and as Moore-
2232 head described them "Valuable franchises" (758, 764 Sum., 23). Moorehead swore that he voted for the lease because of the personality of the persons whom he believed were interested in the securities company. He had little or no knowledge of the transaction at the time of casting his vote (763, 764 Sum., 24). Mr. Widener who presided at the stockholders meeting at which the lease was ratified used the expression "Gentlemen, you will vote first and discuss afterwards" (765 Sum., 24), and Moorehead added that there was no discussion before or afterwards (765 Sum., 24). Moorehead ad-

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mitted that Elkins, Widener, Dolan and Vreeland were usurping the functions of an Executive Committee of the road of the Metropolitan although there was no provision for any such committee by the by-laws (765 Sum., 24). Moorehead pretended to be ignorant of the fact that a syndicate received 2½% from Kuhn, Loeb & Co. for presumptively underwriting $23,400,000 of securities 90% of which had already been subscribed by the shareholders of the Metropolitan Street Railway Company (769, 770 Sum., 25), and he professed to be ignorant also of the fact that some of the shareholders had thus received 2½% more than other shareholders, and that Kuhn, Loeb & Co. received for underwriting $630,000,000 the sum of $1,500,000 (770 Sum., 25). No entries to indicate the payment of the 2½% above referred to as appeared by Plaintiff's Exhibit 32, in the record of the Wormser case to have been paid to James Stillman, E. J. Berwind, G. G. Haven, James H. Hyde, A. D. Juilliard, Grant B. Schley; A. N. Brady; J. B. Duke; Norton Trust Company, Hon. Levi P. Morton, Redmond Kerr & Co. (for. J. J. Corbiere), Col. S. P. Colt, Edward Lauterbach, W. H. Baldwin, Jr., E. H. Harriman; S. Loeb, James Loeb, Lewis S. Wolff, George H. Huhn & Sons, Thomas P. Fowler; Kuhn Loeb & Co., appear on the books of the Metropolitan Street Railway Company or the Interurban Railway Company, nor were any entries made of anything corresponding to the payment of $1,500,000 to Kuhn Loeb & Co. above referred to (770 Sum., 25, 26). John D. Crimmins, a director of the Metropolitan Street Railway Company was to receive 7½% for supervising the reconstruction work provided for under the lease.

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DESTRUCTION OF THE BOOKS OF THE METROPOLITAN STREET RAILWAY COMPANY.

Moorehead swore that in the Spring of 1905, while the Wormser case was still pending and undecided in the Court of Appeals, he sold all of the books of the Metropolitan Street Railway Company prior to 1902 to a junk dealer at the rate of three-quarters of a cent per pound under which the company received $117.00, and in the contract of sale
2237 to the junk dealer there was embodied in Moorehead's own words "A written guarantee from Mr. Darnstadt stating that the books would be converted into pulp at once at their mills" (774, 776, Sum. 26, 27).

According to Moorehead the books so destroyed contained a record of everything that had occurred from the date of the birth of the Metropolitan Street Railway Company and its predecessors to April 15, 1902 (777, Sum., 27, 28). Moorehead said nobody told him to destroy the books and he did it of his own volition because more storage
2238 space was needed at the storeroom but he asserted his destruction of the books was no secret for he had told Mr. Quackenbush thereof in 1905, that is, some months after he destroyed the books (777, 779, Sum. 28). Moorehead even at the time of the investigation asserted that he did not then know that the destruction of the books was a crime and that they were a quasi public record although he admitted that he never heard of any other company besides the Metropolitan Street Railway Company that had sold its journals to a junkman to be destroyed (779-782, Sum. 28, 29). In the destroyed

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books according to Moorehead were the records of consolidations and increases of capital stock from time to time from $16,500,000 until it finally reached on August 2, 1900, $52,000,000 (784, 785, Sum., 29).

All bookkeeping entires relating to transactions between the Metropolitan Street Railway Company and the Metropolitan Traction Company by one of which a payment as large as $6,000,000 was made to the Metropolitan Traction Company disappeared with the destruction of the books (Sum., 29). As the place left vacant by the destroyed books, was 2240
filled with books and records from the various divisions, that Moorehead was compelled to admit that he had made room for minor matters of account at the expense of the destruction of the major matters (788-789, Sum., 29, 30). A. W. Teele, a certified public accountant (790, Sum., 30), testified to an examination he made of the report made by the accountants J. C. Hertle and Max Teichmann whose examination of the books according to their report had disclosed items aggregating $19,186,000 liabilities that had not been entered on the books of the Metropolitan Street Railway Com- 2241
pany. Teele testified that he had found this omission to be a fact but had also found that a similar amount of assets had been omitted from the books and were nowhere carried on the books (794, 795, Sum., 30, 31). In the correspondence that occurred between Belmont and Gaynor over testimony that had been brought out connecting Belmont's name with various transactions in the Ivins Investigation, Gaynor stated in his letter to Belmont that Belmont's salary from July 1, 1903, to July 1, 1906, was at the rate of $50,000 a year and

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was charged to Subway Equipment Account and that until June, 1906, an annual charge was made to Subway Equipment Account for the services of August Belmont & Co. "As financial managers, whose duties to that date were principally connected with the fund raised to purchase equipment" (805, 806, Sum., 32). Oren Root, Vice-President and General Manager of the Metropolitan Street Railway Company, who in 1907, at the time of the investigation was thirty-four years of age, testified he had been in the employ of the road twelve years
2243 and was what might be called "Chief Operating Officer" of the road (864-865, Sum., 34). At the time of the execution of the Metropolitan Street Railway Company and Interurban Company lease, February 14, 1902, Root was a director of the Metropolitan Street Railway, qualified by shares not owned by him but standing in his name (867-868, Sum., 34), and he likewise voted for the lease though he knew the lessor to be a railroad with two or three cars which he had never seen (869-879, Sum., 34). His impression was that the Interurban also owned four or five miles of track and a
2244 carhouse somewhere in Mt. Vernon (870, Sum. 34, 35). The Interurban also had, said Root, some fifty or sixty miles of franchises in the Bronx (870-871, Sum. 34, 35). Root had not inquired at the time of the execution of the lease whether the property of the Interurban was mortgaged but he was satisfied that it had considerable financial backing behind it (871, Sum. 35). None of the fifty or sixty miles covered by the Interurban franchises had, up to 1907, been built upon (873, Sum. 35). A probable explanation for this is that at the time of the lease the Metropolitan owned the Third Ave-

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nue system which in turn owned the Union Railway Company so that by letting these franchises lie unused it left the Bronx open to the Union Railway Company without competition giving that Railway Company a practical monopoly (873-874, Sum. 35). Root largely relied on Vreeland's judgment upon the soundness of the Interurban (874, Sum. 36). Root had never heard of the destruction of the books he said, until it was developed in the Ivins Investigation (879, Sum. 36). Root said that his chief reason for voting in favor of the lease was the financial responsibility of the men behind it and the possibility of obtaining necessary funds to fund the floating debt of $11,000,000 and to develop and reconstruct certain horsecar lines (877-878, Sum. 36), but Root did not know whether the expected $11,000,000 ever was actually paid in and he admitted that there was no way of definitely ascertaining this in view of the destruction of the books by Moorehead (878, Sum. 36). Mr. Ivins contended that there was a discrepancy of $5,000,000 of this amount which had been lost trace of owing to the destruction of the books (878, Sum. 36). Root identified Defendant's Exhibit E found at page 514 in the Case on Appeal to the Appellate Division in the Wormser case by which it appeared that although the net earnings for the year were $3,019,500.27, and other income was $404,024.17, thereby aggregating $3,423,524.44 dividends were paid aggregating $3,639,744.50, in other words, $216,220.06 in excess of the amount earned was paid out in dividends so that a deficit of $216,220.06 resulted for that year (890, Sum. 37). Root asserted that this might be explained by the fact that the figures in the memorandum were for the calendar year whereas the dividends were paid out on

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2248 the basis of the fiscal year but he was compelled to admit that figured on the basis of a fiscal year a dividend of $31,000 would have been shown and had the franchise taxes been paid the deficit of $31,000 would have been increased to several hundred thousand dollars additional (891-909, Sum. 37). Root had testified in the Wormser case that "Now the result of all this arrangement that was made was that the Metropolitan Securities Company through its ownership of the Interurban stock bought everything that belonged to the Metropoli-
2249 tan system, leases and everything else and they agreed to advance this $23,000,000 which was necessary to pay off the floating debt" (Sum. 37-38). But in the face of this testimony Root was forced to admit that 99½% of the 80% of this $23,000,000 subscription came from the stockholders of the Metropolitan Street Railway Company or their assigns because those shareholders subscribed to 80% of the Securities Company stock (909-910, Sum. 38), and therefore instead of the Metropolitan Street Railway Company getting $23,000,000 from the Metropolitan Securities Company
2250 as Root had testified in the Wormser suit, 99½% of 80% of the $23,000,000 was subscribed by the shareholders of the Metropolitan Street Railway Company (911-912, Sum. 38).

THE HERTLE REPORT.

In the report of John C. Hertle, accountant, to Col. W. Amory, relating to the financial condition of the Metropolitan Street Railway Company, spread upon the record as Exhibit 6, commencing at page 937, it was stated: "Inability to verify as-

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sets as claimed in the company's first annual report" (945, Sum. 38-39).

In the report of the Metropolitan Street Railway Company to the railroad commissioners for the year ending June 30, 1894, Vol. 2, page 879, Hertle found the following: "Cost of road and equipment to 30 June, 1894, $15,058,276.96" and again in the same report, at page 880, Hertle found in the company's general balance sheet under the head of assets the same amount, i. e., $15,058,226.96. Hertle's comment on this is:

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"This amount I have made every effort to verify but find it impossible to do so owing primarily to the fact that the company's report for 1894 does not show a cash statement of receipts and expenditures nor any statement of additions and betterments made under date of its consolidation of November 29, 1893, to June 30, 1894; and moreover, with all my efforts to check the figures it seems impossible to account for so large an expenditure by many millions of dollars. Such attempts at verification would have been simplified had 2253
all the railway companies to comply with the law by filing their annual reports with the railroad commissioners. I find that neither the Broadway Railway Company nor the Lexington Avenue & Pavonia Ferry Railroad Company ever filed such annual report while it appears that the reports of the Houston West Street & Pavonia Ferry Railroad Company for several years were inaccurate or incomplete." (948, Sum. 39.)

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Hertle showed that not until four years had passed after consolidation did the Metropolitan Street Railway Company acknowledge its liability for a funded debt specifically assumed on account of the first mortgage bonds of the South Ferry Railroad Company amounting to $350,000 (Sum, 40).

As the total cost of road and equipment up to June 30, 1894, was stated in the company's report to the railroad commissioners as amounting to $15,058,226.96, and as Hertle assumed it must have
2255 included the $350,000, he stated in his report, "I accordingly state that on June 30, 1898, the company laid claim to assets amounting to $350,000 which seems to be a duplication of assets already claimed and which, in my opinion the company was not correctly entitled to." Hertle found that the Metropolitan Street Railway Company had by its report of liabilities as contained in its annual report of June 30, 1894, omitted therefrom $19,186,000 of liabilities as shown by the itemized figures at page 955, Sum. 41, 42. Hertle demonstrated by comparing a statement filed by the Metropoli-
2256 tan Street Railway Company on an application made by it to the stock exchange for the listing of its securities whereby a valuation was set upon its stocks and bonds of $12,075,668.73, with the items carried in its general balance sheet on June 30, 1897, among the assets of the Metropolitan Street Railway Company as bonds of other companies $12,075,668.73, that the Metropolitan Street Railway Company had listed among these alleged securities, stocks and bonds that were absolutely worthless and which most conservatively etimated were worth instead of $12,075,668.73 as claimed by

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the Metropolitan, only $8,112,925 at the outside, showing an over-valuation of $3,962,743.73 (958-962, Sum. 42-44).

Furthermore, Hertle found that the Metropolitan Company's statements from 1896 to 1901 showing an alleged increase in its holdings of stocks and bonds in other companies amounting to $3,241,803.62, could only be accounted for "On the theory that a new and fictitious valuation had been adopted for the investments already detailed, as the records of cash payments do not account for it nor can I find any other record which would 2258 account for this increase." (962-963, Sum. 44), and Hertle described this claim of the Metropolitan as a fictitious and unwarranted over-valuation in investments among its assets amounting to not less than $3,241,803.62. (964, Sum. 44).

Hertle also found that on June 30, 1901, the Metropolitan Street Railway Company was in arreas for taxes in an amount exceeding $2,500,000. or $1,600,000. not including the franchise taxes which was in litigation (964-965, Sum. 45). Hertle found an omission from the Metropolitan Street Railway Company's reports of 1891, 1892, and 2259 1893, of the liability assumed by it of the $6,000,000. of theHouston West Street and Pavonia Ferry R. R. Co., second mortgage bonds which had been issued prior to its consolidation with the Metropolitan in 1893. (972, Sum. 45).

Hertle's findings, seven in number, appearing verbatim at 970-972, Sum. 45-47, were in substance that liabilities and assets that should have been included were omitted; that since 1894 the Metropolitan had claimed surpluses which did not exist; that none of the company's annual reports to the railroad commissioner since 1894 correctly

2260 described the company's true financial condition; that on June 30, 1901, although the company claimed a surplus of $5,403,465.52, and actually paid dividends amounting to $3,393,262.25, no surplus actually existed on that date but a large deficit did exist and the payment of such dividend was not warranted; that liabilities aggregating $24,377,803.62 were omitted from the statement of the Metropolitan Street Railway Company of June 30, 1901, as the company instead of having a surplus as claimed of $5,403,465.52, actually had a de-
2261 ficit of $18,974,338.19; that these figures have been arrived at by allowing the Metropolitan Company credit on every doubtful point even where the company's claims were not warranted but yet were not capable of disproof. Hertle's final conclusion is most significant. He says: "That in order to arrive at a complete and correct statement of the affairs of the Metropolitan Street Railway Company it will be absolutely necessary to make an exhaustive examination of the company's books and records (972, Sum. 47).

Patterson, Teele & Denis, certified public as-
2262 countants, were engaged by District Attorney Jerome to report on the report of Hertle and Teichmann and one of their conclusions was that "the omission of $19,186,000. of funded obligations of leased lines assumed by the company does not affect the surplus as assets of a corresponding value have also been omitted;" (1001, Sum. 47). They also agreed with Hertle that the $350,000. obligations of the South Ferry Railroad Company and the $2,500.000. of Broadway Surface Railroad Company bonds should have been included as liabilities and they asserted that the railroad company

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had since the Hertle report included the $350,000 item, (1031, Sum. 47).

Four checks, two to the order of L. E. Quigg for $1,000. and one to his order for $1,500. and one check to the order of Eugene Elsworth for $1,875., were read into the record by Marvin Scudder as the first step in the attempt to reconstruct the destroyed or lost books of the Metropolitan.

Oren Root recalled admitted that as shown by an analysis of the income and disbursements of the New York City Railway system for the year ending June 30, 1906, the rentals of the Metropolitan 2264
Street Railway Company were $3,640,000 a year on the $52,000,000 of stock, and the rentals on the Third Avenue Road were $960,000 which made a total of $4,600,000 against which there was a balance of receipts of disbursements of only $1,376,477.56, leaving a deficit of $3,224,000 for the year (1127-1128, Sum. 30). Moorehead testified that the three checks hereinabove alluded to to the order of Quigg were charged against construction account because he, Moorehead, presumed that Quigg was employed on construction work (1157-1159, Sum. 50). At pages 1356-1363 appears 2265
a list of the books, records, etc., of the New York City Railway Company and its predecessors prior to April 1st, 1902, which were not destroyed by the junkman and were on hand on September 23, 1907 (Sum. 50).

CONSTRUCTION ACCOUNT.

At the time of the destruction of the ledger of the Metropolitan Street Railway Company by the junkman the amount debited to special construc-

2266 tion therein, was $700,000 or more, according to Moorehead, but Moorehead was unable to produce the checks or vouchers against this account although he had frequently been requested to do so (1365-1366, Sum. 51), except cancelled checks amounting to $20,000 (1366, Sum. 51), and he finally admitted that all of the cancelled checks aggregating $798,000 had disappeared except the cancelled checks aggregating $20,000 (1366, Sum. 51). Moorehead said anybody in the office had access to those checks although he was the custodi-
2267 an of them during their disappearance (1366-1368, Sum. 51), and they were examined at the time of the sale of the ledger and journal to the junkman and he believed that they were probably then mislaid (1368, Sum. 51).

Not only have these checks disappeared but the entries in the check stubs were so made that the names of the payees of the checks were omitted (1369-1370, Sum. 52). Moorehead was so evasive about what had become of the checks that Mr. Ivins was prompted to ask him this question: which is offered you under this law is not immuni-
2268 ty for an acton for perjury?" and he replied, "Perfectly, sir." Moorehead said that the reason he did not enter the names of the payees of the checks under this construction account on the check stubs was that it was desired to keep the names secret from the clerks, and this explanation nowithstanding the fact that the clerks had free access to the checks themselves (1370-1371, Sum. 52). Mr. Ivins read into the record the checks which were actually produced practically all of them being payments to either Quigg or Vreeland (Sum. 53-54), the payments to Vreeland aggregating $25.

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000 and the payments to Quigg aggregating $17,477 so that of the $800,000 Moorehead was able to account only for $57,909.90, of which $42,770 was paid to Vreeland and Quigg (1373-1375, Sum. 54). The voucher showing the payment of the $25,000 to Vreeland was approved by Vreeland himself (1377-1378, Sum. 54). The typical itemized voucher of one of the payments to Quigg of $477 showed that the Metropolitan was paying his office rent, telephone calls to and from Albany, expenses of trip to Albany, and miscellaneous expenses including subscription to the City Record, 2270
etc. (1378-1379, Sum. 55). On some of the stub check books in which the names of the payees were omitted there were pencil quotations of Quigg's initials (1380-1381, Sum. 55-56). Marvin Scudder found from an examination of general ledger number one of Metropolitan Securities Company that there was held in undistributed accounts the following charges of payments to the following person:

Thomas F. Ryan, $24,000.00, June 9, 1903.
Standard Trust Company, $28,500.00, August 7, 1903. 2271
Interurban Street Ry., $60,000.00, October 3, 1903.
Morton Trust Company, $27,492.56, April 22, 1904.
Charles A. Conant, $25,000.00, August 26, 1905 (1382-1383, Sum. 56).

Scudder found that from 1902 the time of the opening of the books to date there had been paid to lawyers the sum of $921,439.68 (1384-1387, Sum. 56), exclusive of sums paid to lawyers in behalf of clients of other lawyers where property was purchased through such lawyers (1384, Sum. 56).

During this time the total paid to Quigg was $217,307.77 (1384, Sum. 56).

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In addition to payments to Quigg and to lawyers which aggregate more than $916,000, as shown above, the books as rewritten purely on a cash basis show these payments:

New York City Interurban	$42,667,624.57
Morton Trust Company	13,296,261.20
Kuhn, Loeb & Company	10,582,158.33
National Bank of Commerce	2,561,826.26

(1384, Sum. 56).

2273 A payment to N. Brady of $965,000 was carried to property account. That was the price paid Brady for the purchase of the Wall Street and Cortlandt Street franchises (1385-1386, Sum. 57). As was later developed Brady claimed that he only received $250,000 of this money and that the balance was paid back by him in checks as follows:

One to Moore & Schley for	$134,028.92
" " William C. Whitney for	111,562.78
" " Thomas F. Ryan for	111,562.78
" " Thomas Doan for	111,562.78
2274 " " P. A. B. Widener for	111,562.78
" " William L. Elkins for	111,562.78

(1617, Sum. 86).

Schley, of Moore & Schley, subsequently testified that the $134,000 paid to his firm in this transaction was credited to the account of William C. Whitney who carried an account with Moore & Schley as brokers (, Sum.). The other payments found by Mr. Scudder upon reconstruction of the account by vouchers from other sources appear at page 1388, Sum. 57. Scudder testified

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that he found a memorandum on the last sheet in one of the stub check books which would indicate that two payments of $5,000,000 and $780,000 were made on July 8, 1902, and on November 12, 1902, to the order of the Morton Trust Company for which no corresponding entry was ever made in the stub (1388, Sum. 58), and as to the $5,000,000 check above referred to there appears to be no entry on the books of the Metropolitan Street Railway Company on that date (1389, Sum. 58). Lemuel E. Quigg was called and testified that he had received from the Metropolitan Securities Company 2276
between November 24, 1903, and the date of the hearing in 1907, a period of about four years, an aggregate of $217,307.77 (1395, Sum. 59). The nature of his services as appeared from his own testimony seemed to be that he was, as he described himself, an accelerator, receiving an annual salary of $10,000 which was charged to property and franchise, page 1402, and which ws subsequently increased to $15,000 a year in addition to fees and other expenses (1403, Sum. 61-62). His services, as near as can be gathered from the record, consisted in his causing subway propaganda associa- 2277
tions to be formed on the east and west side for the avowed purpose of advocating subways, but for the purposes as he claimed of defeating the Belmont inteersts which were then hostile to the street car interests. Quigg's services consisted in forming these associations, providing counsel for them, circulating petitions to which millions of signatures were obtained, and appearing in Albany to advocate or oppose legislation (1396-1417, Sum. 59-65). Among the payments made to Quigg were large items for detective services (1401, Sum. 61), and to attorneys who appeared from time to time to sup

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port or oppose legislation (1472-1473, Sum. 70). Some of the things that Quigg said he was engaged in attempting to prevent were the proposal for a moving platform through 34th Street, the success of the so-called Belmont Tunnel Project, an elevated structure connecting the bridges from the subway, and he was also interested in preventing the third tracking of the Second and Third Avenues elevated structures (1453, Sum. 68). He also did publicity work and rendered advice to Vreeland and appeared in tax matters at Albany (1459-1463,

2279 Sum. 69).

Payments made by Quigg are set forth in detail at pages 1487-1511, Sum. 73-74). Out of $151,000 in payments made by Quigg from money received from the railroad $43,878 were cash checks to the order of McEvilly, Thomas and Coleman, associates of Quigg (1523, Sum. 75), and $10,000 for fees to Quigg, making an aggregate of $53,878 (1524, Sum. 76), as to which Quigg had no means of identifying the name of the persons to whom payments were made (1524, Sum. 76). Quigg said that he intentionally kept no record of the names

2280 of the persons to whom he paid money because he desired to suppress their names (1524, Sum. 76). Quigg able to account for $151,246, as against $218,807.77 paid to him by the Metropolitan Securities Company. At times he received money for which he gave no vouchers (1525-1526, Sum. 76). Quigg admitted pursuing lobbying activities in Albany (1540-1544, Sum. 77), but although he had obtained as he claimed the signatures of millions of citizens to his petition opposing the proposals of the Belmont interests the petitions were never presented but were suppressed after the merger was

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effected between the Street Railway group and the Belmont interests (1556, Sum. 77).

At pages 1414, 1417, Mr. Ivins spread upon the record a communication, dated October 2, 1907, which he had signed as special counsel to the Public Service Commission for the First District, to Adrian H. Joline and Douglas Robinson, Receivers of the New York City Railway Company, in which he said in part:

"You may have noticed the unsuccessful effort which I made yesterday to secure from 2282
the Metropolitan Street Railway Company certain returned checks and vouchers covering payments made on the Special Construction Account of that company. * * * I was not at all satisfied with Mr. Moorehead's explanation of his failure to produce all of the documents in question, nor should I think, if I may venture to say so, that his explanation as you will find it in the official minutes and as it is commented upon in the morning papers will be satisfactory to you as receivers.

I therefore beg to inquire whether or not 2283
you will be good enough as receivers to endeavor to secure the production of the documents in question before the Public Service Commission this afternoon either by causing Mr. Moorehead to produce them or by submitting them to me upon my receipt as has been the custom of the various companies from the beginning of the investigation.

In closing permit me to say that in view of Judge Lacombe's statement in his opinion handed down on the 30th ult. to the effect that—

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'All books in the custody of the receivers and all persons in their employ who may be called as witnesses, will, of course, be at the service of the commission'—

and in view of the unsatisfactory explanation made by Mr. Moorehead not only with reference to the non-production of these vouchers but also with reference to the destruction of the books of the Metropolitan Street Railway Company prior to 1902, I feel confident that
2285 any assistance which you may find yourself able to render the commission will not only be greatly appreciated by it but will also do much to relieve the public mind of its fear that the appointment of Federal receivers will have a tendency to delay the commission in its endeavors."

John B. McDonald testified that he went with the Metropolitan Securities Company after a misunderstanding had resulted between him and Belmont (1563-1564, Sum. 78), and he worked also
2286 with a syndicate consisting of Thomas F. Ryan, E. J. Berwind, Anthony N. Brady and Norman Ream.

McDonald made a contract with the Metropolitan Securities Co. on January 25th, 1906, by which he received from that company $150,000.00 to defray such expenses as he had incurred prior to January 1st, 1907 (1582-1583, Sum. 78), and McDonald received an additional $10,000.00 to reimburse him for a legal fee in that amount paid to Edw. M. Grout (1585, Sum. 78). In addition to the $160,000.00, above referred to, McDonald received $100,000.00 on February 1st, 1907, making a total received by him from the Metropolitan Securities

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Company of $260,000.00 (1585, Sum. 79), which sum was carried on the books of the Metropolitan Securities Co. to Property and Franchises Account, and, therefore, on its books, constituted an asset, notwithstanding that the entire scheme had been abandoned and McDonald had been settled with (1585, Sum. 79).

Meanwhile, the Interborough-Metropolitan merger had taken place, although McDonald disclaimed knowledge of whether this was a moving consideration for the abandonment of his relations with the Metropolitan Securities Co. (1588, Sum. 79). 2288
McDonald did, however, thereafter enter into a contract with the Interborough-Metropolitan Co. of which he was a Director and Vice-President at the time of the investigation, providing for the payment to him of $50,000.00 a year for five years, whether or not he rendered services. Up to the time of the investigation he had rendered no services (1589-1593, Sum. 79-80).

Under an agreement dated February 14th, 1902, between the Metropolitan Securities Co. and the Interburban Street Ry. Co., provision was made for the issuance of $15,000,000.00 of debentures which 2289
the Interurban Company was authorized to issue and which were sold at seventy, resulting in a discount of $4,500,000.00, which, up to 1906 continued to appear in the books of the company as an asset (1598-1600, Sum. 80).

Anthony N. Brady, President of the Wall and Cortlandt Street Ferries Railroad Co. (1601, Sum. 80-81), stated that he had bought the franchise, stock and bonds of the road with the intention of building, but that he had been dissuaded therefrom by Wm. Whitney, who pointed out that fric

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tion might result if Brady attempted to operate on this side of the river, with the result, according to Brady, that Brady decided to sell out to Whitney for $250,000.00 which was the cost of the securities to Brady (1613, Sum., 84). Brady claimed that he was in ignorance of the provision of the agreement between Kuhn-Loeb & Company and the Metropolitan Securities Company, whereby the Bankers, Kuhn-Loeb & Company agreed to use their best efforts to bring about a sale to the Securities Company of the issued shares and other securities of

2291 Brady's road among others (1614, Sum. 85). Brady retained ownership of the road for about two years, but although he stated that he received only $250,000.00 for the securities he admitted, when a check of the Metropolitan Securities Co. dated May 22nd, 1902, for $965,607.19 was shown to him, that he had received it and also identified the vouchers accompanying it, showing that the check was given in payment of Brady's $1,000,000.00 of stock and $1,000,000.00 of bonds of the Wall and Cortlandt Street Ferries Railways Co. (1615, Sum. 85). Brady insisted, however, that all that he got

2292 out of the $965,607.19 was $250,000.00 and that the balance of about $715,000.00 he paid out by his own checks as follows:

$134,028.92 to Moore & Schley, who it will be recalled, credited this check to the account of Wm. C. Whitney according to the testimony of Schley, and $111,652.78 each by checks to the order of Wm. C. Whitney, Thomas F. Ryan, Thomas Dolan, P. A. B. Widener and Wm. L. Elkins (1615-1617, Sum. 85-86). The item of $965,607.19 was carried on the cash book of the Metropolitan Securities Co. against Property and Franchise Account, constituting the largest single item in that account (1617,

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Sum. 86). The history of this road for which the Metropolitan Securities Co. thus paid $965,607.19 of which only $250,000.00 was retained by Brady, was briefly that it was organized in 1885 with an authorized capital of $700,000 (1602, Sum. 81), and that between that date and 1888 no report was made to the street railway commission, and that in 1892 there appears in the report mention of a funded debt of $450,000 in addition to the $700,000 capitalization.

In 1894 it appears that the capitalization was $687,700 and the funded debt $500,000 and the 2294
cost of road and equipment $1,887,700 (1602, Sum. 81), although neither at that time nor at any subsequent time had any work of construction been done pursuant to the franchise which roughly ran from the foot of Wall Street East River, to the foot of Liberty Street North River, traversing important streets like Wall, Pine, William, Liberty, Cortlandt, and Fulton Streets as well as Broadway (1602, 1605, 1606 Sum. 82-83).

In 1895 the first report of the road was filed and that showed a capitalization of $700,000 consisting of seven thousand shares, par value of $100 of 2295
which 6,877 had been issued, seven for cash at par, and 6,870 on account of construction. So that the cash realized on the stock was $700 and the funded debt $500,000 although no road had been built or commenced (1602, Sum. 81).

In the 1898 report Patrick Keenan appears as president of the company and in the 1899 report the capitalization is given at $1,000,000 and the funded debt of $1,000,000 and of the capitalization sixteen shares had been issued at par for cash, being a total of $1,600 and 9,984 shares issued for property of the old company. The president in this year is

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given as A. N. Brady. The company from year to year failed to file reports as required by law and it appears that in 1897 the road was sold under a judgment of foreclosure the purchaser at the foreclosure being Joseph V. Donald (1603, 1606, Sum. 82, 84).

No explanation appears in the record of the Ivins' Investigation of the circumstances that justified the division of the $700,000 surplus above the $250,000 retained by Brady, among the directors of the Metropolitan.

2297 Marvyn Scudder attempting to reconstruct the books of the Metropolitan Street Railway Company, the sub companies of that company, the New York City Railway Company, and the Metropolitan Securities Company, found that in addition to the salary of $25,000 per year subsequently raised to $40,000 a year which had been paid to H. H. Vreeland, he had received from these companies as shown by vouchers which could be found $113,316 and as appeared but as to which vouchers could not be found $185,249.06, making an aggregate received by Vreeland over and above his salary from
2298 these companies of about $300,000 (1618-1621, Sum. 87-88).

Among the items of payments made to Vreeland there was identified by Edward W. Sayre, of the New York City Railway Company a check for $66,000 to the order of Vreeland of which $65,000 according to Sayre represented Vreeland's salary, and the additional $1,000 was a reimbursement to Vreeland for a call amount paid by him on a call for ten per cent. on his subscription to the stock of the Interstate Tunnel Company of New Jersey, one of the enterprises in which McDonald was engaged. This $1,000 was charged against the

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property and franchise account of the Metropolitan Securities Company (1623 Sum. 88).

Sayre also identified a voucher showing a payment to Thomas F. Ryan of $24,000 on June 9, 1903, entered in the Ledger Account of "Undistributed Items." Sayre was unable to say for what purpose this money was paid to Ryan and why it had never been collected from Ryan or charged to Ryan, but he did know that as Treasurer of the company he drew the check by order of the president (1623-1624, Sum. 88-89).

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Sayre also identified a check for $25,000 dated August 26th, 1904, to the order of Charles A. Conant, which it appeared was drawn by Sayre at the order of president Vreeland of the company to repay Conant for a loan made through Conant to Thos. C. Quin of the New York Daily News. Quen's name was nowhere indicated in the transaction and Sayre did not know why the loan was made to Quin, but he did know that it had not been repaid by Quin. The company received no notes as evidence of this loan until February, 1907, although the loan was made to Quin in August, 1904 (1625-1626, Sum. 89-90).

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Sayre admitted charging to property and franchise account two payments aggregating $4,500, made by the Metropolitan Securities Company to one Little for services as advisory expert accountant although Sayre knew of no reason why they should be charged to property and franchise account thus appearing as assets.

Sayre identified a voucher showing a payment of $33,100 to William N. Cohen, and as appeared by the correspondence the payment to Cohen was made for 200 shares of Metropolitan Street Railway Company at 165½ which represented to be the

2302 price paid for the stock on February 7, 1902, apparently by a client of William N. Cohen (1628-1629, Sum., 91).

Sayre identified vouchers for two payments of $5,000, each to J. Sergeant Cram for a "Retainer in legal services," at any rate that is what Vreeland told Sayre was the purpose of the payment (1629-1630 Sum., 91-92).

The $5,000 payments to Cram and the $24,000 payment to Ryan were each charged against property and franchise account (1630, Sum., 92).

2303 Sayre identified a voucher register entry showing payment to Daniel F. Cohalan of $5,000, which was carried to Investment Account (1631-1632, Sum., 92).

Sayre identified a check to the order of the Standard Trust Company for $28,500, entered in the Undistributed Account, which had never been charged to the Standard Trust Company nor collected from it. Sayre had received the draft of the Standard Trust Company but delivered it to Thomas F. Ryan, to whim he had been instructed to give it by Mr. Vreeland. The payment to Ryan

2304 was supposed to have been for disbursements incurred by Ryan on behalf of the Metropolitan Securities Company but Ryan supplied no vouchers for any of these disbursements and he was an officer and director of the Metropolitan Securities Company at the time (1632-1634, Sum., 92-93). Mr. Cravath stated that the money had been repaid but it did not appear by whom it was repaid (1634, Sum., 93).

Mr. Ivins offered the minutes of the Metropolitan Securities Company in evidence for the purpose as he stated of showing "How minutes are not kept." A typical set of such minutes consisted of

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a statement of the date of the meeting, the persons present, and some such general statement as the following: "General matters of interest pertaining to the affairs of the company were discussed. The meeting then adjourned" (1650, Sum., 93).

Sayre identified three checks for $5,000, each to the order of August Belmont and charged to "Miscellaneous general expense" which according to the correspondence set forth in the record which Sayre identified, were collected by Belmont "As a special contribution on behalf of the interests represented by this company to the fund for the investigating 2306
of questions connected with the municipal ownership and operation" which investigation was conducted by the National Civic Federation of which August Belmont was president. The checks were drawn to the individual order of Belmont (1656-1660, Sum., 93-95). The stockholders of the Metropolitan Securities Company never voted to make these payments nor were they informed that the disbursements were being incurred. The payments were carried to general expense account and Sayre said he did not know why the checks were made to the order of Belmont personally, but he did re- 2307
member that Vreeland directed him to make the payments (1660-1661, Sum., 95).

Sayre identified a check dated April 22, 1904, to the order of Morton Trust Company for $37,492.56, which was carried in suspense account with no voucher attached showing what the payment was for and the amount was so carried from 1904 to the time of the investigation (1662-1664, Sum., 95).

Sayre identified a bundle of checks aggregating $28,836.28, practically all payments made to one MacDona who performed services usually performed by a press agent and these payments were

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charged to property and franchise account (Sum., 96).

Examination of the property account of the Metropolitan Securities Company and other accounts of the same company show that they paid between February 17, 1902, and September 23, 1907, to lawyers, an aggregate of $916,438.68 (1684, Sum. 99). The books of the New York City Railway Company and the Metropolitan Street Railway Company for the same period show additional payments to counsel of $238,277.66, making a total of payments to counsel by the Metropolitan Street Railway system during the period of $1,154,666.34 not including the accident account (1684, Sums., 99-100).

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Because of the destruction of the books of the Metropolitan prior to April 30, 1902, Marvyn Scudder attempted to reconstruct the lost books by entries found in other books, particularly the stubs on the different banks (1696-1697 Sum. 101). From the entries in or upon the stubbooks, Scudder was able to testify that the payments enumerated by him were charged to one or the other of the accounts as indicated (1698-1718, Sums. 101-105). Among these payments were found vouchers aggregating $154,300 representing payments to the Morton Trust Company for securities of the Metropolitan Street Railway Company paid under the orders of President Vreeland through Thomas F. Ryan (1716, Sum. 104-105). Sayre in each of these cases of purchases made through A. A. Ryan & Bro. drew the checks by order of Vreeland (1716-1718, Sum. 105).

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Sayre's attention was called to the fact that of two checks drawn to the order of Cash, one on

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October 21, 1902, was made at a time when there was pending an important election in the City of New York not only for the local officers of alderman and members of assembly but for Governor of the State, the opposing candidates then being Coler and Odell, and the aggregate of these check being $540,000, which were charged to investment account 1718-1719, Sum. 105-106). Asked what this money was for Sayre stated that it was for some special disbursements in respect to the purchase of certain claims against the Wall and Cortlandt Street Ferries Railway Company, or at any 2312
rate that was what Vreeland told Sayre the payments were for (1719, Sum. 106). The voucher endorsement showed that the check was drawn to the order of Charles E. Warren and distributed to investment, whereas the check was in fact drawn to the order of cash. When Sayre was asked whether Warren if sober could explain what was done with this money he replied that he did not think Warren could but he did believe that Warren handed the money to Vreeland. Sayre said he did not know who got the money from Vreeland (1720, Sum. 106). 2313

Similarly Sayre did not know what had happened to $5,000 shown by a voucher to have been drawn out on a cash check and charged to investment account except that the money was handed to Vreeland. He did not know what Vreeland did with the money (1720, Sum. 106-107).

Sayre produced under subpoena a check for $250,000 dated October 12, 1900, drawn on the Morton Trust Company payable to the order of the Metropolitan Street Railway construction account. This check signed by Vreeland and Charles

2314 E. Warren was not drawn from a perforated checkbook but apparently from a private pocket checkbook and was endorsed "Metropolitan Street Railway Co., by H. H. Vreeland, president, Charles E. Warren, Secretary" but there was no entry on the check or on the checkstub of any reference to the transaction in any of the documents in existence at the time of the investigation to indicate why the check was drawn although Sayre stated that he thought Vreeland or Warren could tell this. Incidentally this check for
2315 $250,000 was drawn in the Fall of the year of a presidential election (1721-1722, Sum. 107).

Grant B. Schley testified that the check for $134,028.92 made to the order of Moore & Schley by Brady part of surplus over and above the $250,000 which Brady claimed was all that he retained out of the $965,607.19 check of the Metropolitan Securities Company to Brady on the Wall and Fulton Street deal, was credited to the account of William C. Whitney who carried an account with Moore & Schley (1784, Sum. 108). Schley testified concerning accounts conducted by
2316 the Metropoplitan Street Railway Company with Moore & Schley under various designations. One account entitled the "H" account showed purchases of Third Avenue Railroad Company stock aggregating $6,585,070.36 (1787-1788, Sum. 108). These stocks were purchased under the direction of Whitney and Vreeland and daily reports were rendered to Vreeland who was president at the time (1788, Sum. 108). Notwithstanding that the aggregate of purchases as shown by Moore & Schley's records was $6,585,070.36, principally of Third Avenue Railroad Company stock, the books

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of the Metropolitan show that payments were made to Moore & Schley aggregating $7,667,032.10 (1791, Sum. 108-108). Other accounts carried by Moore & Schley for the Metropolitan were designated "S H. No. 1" showing aggregate purchases of $88,249.06, which account had formerly been conducted by Whitney but had been transferred by him to the Metropolitan Street Railway Company at the price at which he had bought the stock (1792, Sum., 109). Also an account entitled "M. C." aggregating $176,498.18 (1793-1794, Sum., 109). Another account was designated 2318
"Metropolitan Street Railway Company" and showed the transactions aggregating $943,046.96 (1794-1795, Sum., 109-110).

Fred C. Cocheu called as a witness testified about the deal in which he was interested with Patrick H. Flynn, Michael J. Coffey, James Shevlin and John Keenan. They formed a syndicate to purchase the Peoples Traction Company, the New York, Westchester & Connecticut Traction Company, and the North Mt. Vernon Street Railway Company (1799, Sum., 110). The syndicate paid $150,000 for the Peoples Traction Company 2319
and purchased the North Mt. Vernon Street Railway at foreclosure for $16,000 (1799, 1800, Sum., 110). The syndicate also had what Cacheu described as a trusteeship, for which it paid nothing, over the Edenwald Street Railway Company. These properties were turned over by Cocheu's syndicate to one Robert S. Bussing in 1902. The syndicate had been acquiring franchises since 1898 in Westchester with the object of extending the system out to the Connecticut line (1801-1802, Sum., 110-111).

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At the stockholders' meeting of the Interurban Street Railway Company in November, 1901, at which the company was organized and in which Cocheu's name appears as one of the incorporators substitutions were made and the resignations of Cocheu and his associates were accepted, the syndicate associates thereby stepping out of the Peoples Traction Company, The New York, Westchester & Connecticut Traction Company and the North Mt. Vernon Traction Company (1802-1803, Sum., 111). The actual negotiations for the sale by the syndi-

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cate to Whitney were had by Flynn, who, as Cocheu said, was "Captain of the ship." It will be recalled that the syndicate had acquired the Peoples Traction Company for about $150,000. By the Bussing contract of February 14, 1901, they sold it for $1,600,000 of which about $1,000,000 had been paid at the time of the investigation and there was a dispute as to the $400,000 or $600,000 still owing (1804, Sum. 111). Flynn procured a loan of $200,000 from Kuhn, Loeb & Co., on the credit of the syndicate's interests in the contract so that in addition to the $1,000,000 received by

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the syndicate in cash, $200,000 was paid to Flynn by way of this loan (1806, Sum., 112). But when Cocheu was asked whether the loan had ever been repaid he said that he knew that Flynn had not repaid it but he did not know whether other people had paid it. Cocheu as a member of the syndicate received no part of that $200,000 (1806, Sum., 113). At the time of the sale of the syndicate's properties to the Interurban Company for $1,600,000 the only thing that the company had over and above the unexercised franchises by way of assets was a road in operation from the station at the

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City of Mt. Vernon up through Lincoln Avenue and out towards White Plains for some distance, and at points of vantage they had twelve to fifteen hundred feet of road laid so that no other road could come in and cut them out. The syndicate also had two or three cars and a carbarn all of which had been taken in the purchase price of $16,000 for the North Mt. Vernon Company (1807, Sum., 113).

2324

Defendant's Exhibit "U."

COMPENDIUM

OF

GRAND JURY INVESTIGATION

regarding the stockholders' committee, etc., of the Metropolitan Street Railway Company, January 24, 1908.

Mr. Jerome addressing the Grand Jury stated that the presentment had been found "That there was a general and widespread belief on the part 2325
of the citizens of this community that very serious crimes had been committed in connection with the public service corporations and traction companies and financial institutions, and this being a great commercial city if such crimes had been committed, they were much more serious to the community generally than the ordinary run of time; they should be sought out and whoever had permitted such crimes should be punished for it, and if the law was inadequate, the legislature now being in session, those laws should be amended to confer

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abolute protection" (pp. 5-6). A dialogue then ensued between Franklin Pierce, attorney for the Citizens' Committee of persons interested in traction matters regarding the course to be pursued in conducting the investigation. It was Pierce's claim as embodied in a letter addressed to the Grand Jury that Jerome should be superseded by another attorney who had a more open mind, for as Mr. Pierce stated "The conviction that a man is guilty is a condition precedent to the conviction of any man, and I think my friend will agree with
2327 me on that. Now whether it be wrong or be right, there is an impression abroad that Mr. Jerome does not believe that these men are guilty" (pp. 6-12). To which Mr. Jerome responded "Let me correct that impression right here. I have iterated and reiterated ad nauseum my belief in the fact that they are guilty" (p. 12).

In the course of the dialogue, Pierce suggested that a special assistant be appointed as to which Mr. Jerome stated the law conferred no authority upon him (pp. 13-14).

Pierce suggested that a prosecution be instituted
2328 against Moorehead and the others who were responsible for the destruction of the books, to which Mr. Jerome responded that Moorehead was protected by Section 20 of the Public Service Commission Act which conferred absolute and complete immunity upon him in consideration of his having testified before the Ivins' Investigation (pp. 14-15). Jerome added that nobody else could be prosecuted because Moorehead and everybody else had asserted that Moorehead acted without instructions from anybody else (pp. 15-16). Pierce, however, insisted that correspondence could be brought forward which would show that Moorehead acted

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on instructions (p. 16). In the course of the discussion, Jerome stated "Everybody concedes that Moorehead lied before the Public Service Commission. Everybody concedes that Moorehead had a criminal intent in doing it. Don't you see that Section 20 grants immunity" (p. 16). Pierce then suggested a prosecution based on the flotation of the Metropolitan Securities Company by which Kuhn, Loeb & Co. received $1,500,000 to float the securities (p. 20), to which Jerome replied stating that the matter had been investigated and found to contain no elements of a crime (pp. 20-21). Pierce then suggested that a criminal prosecution be instituted against Ryan, Widener, the other Philadelphia directors, and Vreeland, who, in violation of the by-laws of the company, acted as an executive committee and carried out the whole transaction and formed the Metropolitan Securities Company to which Jerome made no reply (pp. 21-22).

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Pierce then suggested that a prosecution be instituted by reason of the fact that millions and millions of dollars were charged as the cost per mile for the change of some of the crosstown roads from horse railways to electric railways, to which Jerome replied that there were mitigating circumstances such as bookkeeping entries which explain the apparently excessive charges (pp. 22-23). Pierce then referred to the matter of the Wall and Cortlandt Street Ferry franchise and stated: "There is sufficient (evidence) mountain high, and a lawyers that could not convict under the law ought never to try another case in God's world" (p. 23), to which Jerome replied that the men who participated in the Wall and Cortlandt Street

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franchise had gained immunity by the provisions of the Statute of Limitations (p. 24). Pierce then suggested that they be prosecuted for conspiracy to which Jerome stated an indictment would not lie (pp. 24-26).

William M. Ivins, examined by Mr. Jerome, testified. He reviewed in a general way the testimony elicited by him upon the Public Service Commission's investigation and in the course of his testimony was asked the following question and made the following answer:

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"Q. Let me ask you, Mr. Ivins. Mr. Moorehead testified in regard to the destruction of these books. Mr. Moorehead swore as I recall it distinctly that the books were destroyed without any suggestion from any other individual. Of course, considering Mr. Moorehead's relations in the company, his subordinate position, nobody who heard that testimony believes it.

A. Well, I have got four folios of Shakespear at home and if my servant would swear

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that she had burned those four folios of Shakespear without any instructions and had done it quite of her own will in order to make room for some Saturday Evening Posts in my bookcase, I do not think anybody would believe it" (pp. 155-156).

Ivins testified "Those books were destroyed but at the time of their destruction, they were no longer in use, a new set of books having been opened. This is as I understand it. Now, so far as that new set of books is concerned, Mr. Scudder of whom you spoke has been at work on those with an as-

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sistant to the extent to which he has been able to work at all in view of the fact that three or four different sets of accountants wanted the same books at the identical moment. * * * I understand why a man may desire to destroy the records of transactions that he does not want too closely scrutinized, but I don't understand his saying they had been destroyed and nevertheless keeping them under such circumstances that the very result that he has tried to prevent may nevertheless happen" (p. 166).

End of discussion as to manner of conducting 2336
investigation and proof to be adduced to convict the persons liable of offenses.

February 17, 1908.

Paul D. Cravath, examined by Mr. Jerome, testified that the reason the Metropolitan Securities Company bought from a client of Judge Cohen about one hundred shares of stock of the Metropolitan Street Railway Company was that Judge Cohen came to Cravath and stated that his client who had paid about 160 for the stock was dissatisfied and contemplating commencing an action against the Metropolitan Securities Company by 2337
reason of the merger that had just gone through. The market price of the stock was then 105, but Judge Cohen said that his client, who was very litigious, would bring suit unless his stock was bought for 160 "And after becoming satisfied that unless that stock were bought, we would have a very troublesome litigation, I decided to advise the company to comply with Judge Cohen's terms and buy the stock especially because Judge Cohen said that if that stock were bought, he would not enter into any other litigation of that character against the Metropolitan Company. * * * I knew

2338 that if Judge Cohen started a law suit at that time, it would invoke other law suits and it was bad policy to have litigation when no other law suits were in sight, and I thought it was cheaper to buy the stock at 160 a share than to have a law suit and I so advised and bought the stock" (pp. 80-81). * * * "We had a large debt and any kind of a law suit at that time would have made it difficult to carry through the financial plans I knew were in contemplation" (p. 82).

2339 Other witnesses called whose testimony was practically entirely a repetition of that given either in the Ivins' Investigation or in the first Grand Jury Investigation (1907) were Arthur W. Teele, who testified, pages 197-299. H. H. Vreeland who testified, pages 300 to 408 and pages 415 to 560, and Joseph A. McGregor, who testified, pages 409 to 415.

March 30, 1908.

2340 Thomas F. Ryan, recalled, asked permission to read a statement to the Grand Jury concerning the accusations made against the management and directorate of the Metropolitan Street Railway Company which charges he said might be summarized as follows:

"1. That the stock of the company consists chiefly of water.

2. That enormous profits were made by so-called insiders through construction contracts and otherwise.

3. That after the purchase by the Metropolitan Securities Company of the Wall and Cortlandt Street Railway, the insiders appropriated $111,000 each to his personal use. Each of those is false" (pp. 561-564).

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Ryan then took up each of these charges in order reading from his memorandum (p. 564) and being cross-examined thereon (pp. 567-637). His testimony was practically a repetition of his testimony before the 1907 Grand Jury.

Quigg was recalled and testified (pages 634-643) practically to the same effect as his previous testimony about the envelope containing the twenty-one thousand dollar bills being carried by him to Odell.

John B. MacDonald recalled, testified (pages 644-660).

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Anthony N. Brady, testified again (pages 660-676), substantially to the same effect as his previous testimony.

D. Clifford Moorehead, recalled, reiterated his testimony (pages 676-680), as to his having ordered the destruction of the books. He protested that he did so absolutely upon his own volition and without either conference or consultation with any officers, directors or employees of the company relating thereto (page 677).

A. D. Juilliard, a member of the Board of Directors of the Metropolitan Securities Company at the time of the Wall and Cortlandt Street Ferry deal in 1902, testified that he knew nothing about the transaction other than that he voted for the acquisition of the four franchises of which the Wall and Cortlandt Street Ferry was one for $2,500,000.

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The testimony of Thomas P. Fowler, likewise a director at the time, was similar in substance and effect except that he added that he signed the $965,000 check as president of the road (pages 686-689).

Similarly Edward J. Berwind, who testified at pages 690 to 692.

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Allan A. Ryan testified (pages 693-697) to commissions earned by his firm, A. A. Ryan & Brother, in the purchase of stocks for the account of the Metropolitan Securities Company.

Sayre, recalled, testified (pages 698-734) substantially to the same effect as his previous testimony in the previous Grand Jury and Ivins' Investigation.

George S. Bixby, a lawyer, testified (pages 735-753) stating that although his name appeared as the vendor of the four franchises including three
2345 in the Bronx and one the Wall and Cortlandt Street Railroad Company he stated that he was not the actual owner of any of those but merely acted as a trustee for someone whose name he did not recall (pages 735-739), in substance and effect admitting that he was a mere dummy acting under the direction of William H. Page, Jr. (pages 744-745), asserting later, however, that he believed that Page was acting for a client who owned the stocks and bonds of the railroad (page 751).

Sayre, recalled, testified (pages 754-757) to mat-
2346 ters which had substantially been covered in the previous investigation.

Charles S. Ludlam, certified public accountant, of the firm of Haskin & Sells, testified (pages 758-784) to the reason for charging off various payments made by the road against certain accounts.

Jerome read into the record before the Grand Jury a letter addressed to him under date of February 10, 1908, by John C. Hertle, who, it will be recalled, had made an accountant's report on the Metropolitan Street Railway Company at the request of Colonel Amory (pages 785-790).

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Quigg, recalled, testified (pages 791-792) to matters of no great materiality.

William H. Page, testified (pages 793-794) that he had no facts or figures that would throw any light on the Wall and Cortlandt Street Ferries Company transaction though he admitted that Whitney was his client in 1902. He had, however, he said, never heard anything about the sale of the road (pages 793-794).

William N. Cohen, testified (pages 795-800), in substance and effect to the same transaction as had Mr. Cravath, i. e., the purchase by the Metropolitan Securities Company of about one hundred shares of Metropolitan Street Railway stock at 160 to avert threatened litigation by Cohen's client.

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William Travis Jerome, testified (pages 801-802), denying the truth of the allegation by Amory "That the District Attorney knew of the destruction of the books of the Metropolitan Street Railway Company in 1904 and neglected to act though such destruction was a crime."

H. H. Vreeland recalled, testified (pages 803-804), that he advanced sums of money aggregating approximately between four and five hundred thousand dollars sometime prior to January 1, 1900, to William C. Whitney at Whitney's request. Whitney informed him that the moneys were to be used for political purposes for the advancement of the interests of the Metropolitan Street Railway Company. Subsequently the Metropolitan Street Railway Company was reimbursed for these moneys advanced, (page 803). The Metropolitan Street Railway Company was reimbursed by Mr. Whitney who "turned over the money in the shape

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2350 of checks; a check or checks, I don't know which it was endorsed to my order" (page 804). Vreeland was then asked whether part of the reimbursement was in current funds upon Philadelphia and he admitted that that was his information, that it was by a draft endorsed by George Huhn & Sons (page 804).

George A. Huhn, a Philadelphia broker, testified (pages 805-807) from a transcript of the books of his firm, George A. Huhn & Sons in 1900 that on January 20, 1900, his firm received from New
2351 York 3,500 shares of Electric Storage stock and also received checks of $100,000, each from five different parties, i. e., Whitney, Ryan, Elkins, Widener and Dolan, with instructions to get checks from Elkins, Widener and Dolan "in exchange for these, and to remit to New York altogether $755,000" (page 806). That thereafter his firm sold the storage stock for $255,000, which proceeds together with the five other checks Huhn testified he brought to New York and delivered to Whitney. He recalled that the delivery was to Whitney personally for he stated he would not have delivered
2352 it to anybody else except Whitney without a voucher. The delivery to Whitney was in the shape of Huhn's checks for $355,000 and a draft on New York for $400,000. Huhn endorsed the checks and draft at Whitney's direction to Mr. Vreeland who received the aggregate amount of $755,000 on January 20, 1900 (page 807).

Testimony closed.

Defendant's Exhibit "V." 2353

COMPENDIUM OF

1. Communication received by the Board of Estimate and Apportionment.

2. Communications received by the Comptroller.

3. Communications received by the Mayor.

4. Publications in the press of the City of New York.

All relating to matters set forth in the alleged 2354
contemptuous communication.

Also abstract from a memorandum of Judge Mayer, dated December 27th, 1919, which, while written after the date of the alleged contemptuous communication, reflects conditions existing on that date.

COMMUNICATIONS RECEIVED BY BOARD OF ESTIMATE AND APPORTIONMENT.

Read at Meeting, July 12, 1918.—Communication from Winfield A. Haller, president, Haller 2355
Car and Locomotive Corporation, stating that by the adoption of modern efficient equipment and the use of modern appliances the gross earnings of street railway companies can be materially increased and the operating expenses decreased to the extent of at least 40 per cent., and submitting figures purporting to show how this gain may be reached.

July 19, 1918.—Communication from Abe Alprit in opposition to increase of fare by New York Railways Company.

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July 19, 1918.—Communication from Central Federated Union of Greater New York and vicinity, protesting against increase of fare on subway, surface and elevated lines.

July 19, 1918.—Communication from Maurice Segall, Irving Schwartz and Harry Segall, protesting against any increase of fare on the lines of the Brooklyn Rapid Transit Company.

Sept. 20, 1918.—Communication from Ernest
2357 Bohm, corresponding Secretary, Central Federated Union, requesting Board to hold hearings at night on petitions to increase fare, so that the workers may be heard.

Asked for hearings at night "so the men and women who will have to pay the increased fare may be heard."

Sept. 20, 1918.—Communication from Hon. B. C. Vladeck, Alderman, 56th District, presenting figures showing net profit of Brooklyn Rapid Transit System and alleging the figures are
2358 sufficient proof that no more revenue is necessary for the operation of the lines.

Read at Meeting, Sept. 20.—Thirteen (13) protests from Flatlands Property Owners Association, Joseph Newman and others, against the application of Brooklyn Rapid Transit Company for an increase of fare.

Sept. 20, 1918.—Communication from H. P. McGovern and William N. Amory against increase of fare on street railways in New York City.

2359

Sept. 20, 1918.—Communication from Henry Nordheim in protesting against increase of fare on New York Railways Company's lines.

Oct. 18, 1918.—Communication from Edwin Markham, from General Manager, Johnson Shipyards and from E. J. McCort, President, McCort Bros., Inc., in opposition to the joint application of the Richmond Light and Railroad Company and the Staten Island Midland Railway Company for an increase in fare from five to seven cents. 2360

Sept. 26, 1919.—Communication from Central Federated Union of Greater New York and vicinity against charge for transfers or increase in fare on transit lines of the City.

COMMUNICATIONS TO THE COMPTROLLER.

Jan. 13, 1919.—Letter from New York Board of Trade and Transportation, 203 Broadway, enclosing copy of resolution regarding the transit situation.

Resolution to form representative body of commercial and civic organizations to make representations on behalf of people to the authorities to avoid possible disaster. 2361

Resolution that service cannot be properly continued unless revenue from fares is sufficient.

Jan. 25, 1919.—Letter from John Finck, real estate operator, 198 Broadway, enclosing statement of views on transit situation, and stating that said statement had been mailed to the

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public press and leading authorities and administration officials.

Fare should be increased and transit companies should make fair and reasonable concessions.

Jan. 24, 1919.—Letter from Richard C. Harrison, secretary of the City Club of New York, 55 West 44th Street, enclosing communication addressed by the City Club to Mayor Hylan on the transit situation. This statement registered a protest against granting of an increase in fare.

2363

Jan. 24, 1919.—Letter from George M. Rafter, 261 Washington Street, New York, protesting against the alleged unfairness of the City officials towards the bondholders and stockholders of the transit company.

Jan. 28, 1919.—Letter from Independent Club of the West Side (A. P. W. Seaman, 60 Broadway), requesting that the Speaker from the Comptroller's office attend a dinner to be given by the Independent Club for the discussion of the transit situation, and that several hundred pamphlets be sent for distribution.

2364

Mr. Shonts and Judge Ransom were to attend and speak.

Jan. 22, 28 and 30, 1919.—Letters from John Adikes, chairman of the Transit Committee of Queens Chamber of Commerce, Jamaica, L. I., asking for information with regard to the transit situation so that the Chamber might act upon the same.

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Feb. 4th, 1919.—Printed Preliminary Report of the Local Transit Committee of the Brooklyn Chamber of Commerce. The first paragraph of this report reads as follows:

"The receivership of the Brooklyn Rapid Transit Company and the probable bankruptcy of other transit companies present a most serious situation. Its continuance without the prospect of a constructive plan of relief will, through the bankruptcy of the other lines, result in heavy financial losses not only to the 2366
companies but also the City through its investment in the dual system, will reduce and impair service which will affect every interest of the public and will cause hardship and widespread industrial disturbances."

And later in the report says:

"These past sins of company mismanagement have other and wider effects. With the resulting bad service and collisions between public and private interests, the public believes 2367
and with large justification, that the companies have no real end in view but to exploit the public. The public at large, therefore, has no confidence in the statements of the companies nor in their good faith."

Feb. 1, 1919.—Letter from Charles F. Noyes, Real Estate, 92 William Street, regarding the transit situation.

Suggested that a "self-sustaining" rate of fare be allowed the traction companies in order to protect City's investment and to prevent loss to taxpayers.

2368

Mar. 3, 1919.—Letter from Joseph F. Seitz, Real Estate, 767 Lexington Avenue, New York, with respect to the transit situation.

Suggested that fare be increased.

June 14, 1919.—Letter from W. W. Conley, Manager of the Reo Chemical Company, 79 Barrow Street, New York, requesting information with regard to the transit situation.

Inquired whether if there should be a default on the I. R. T. 5s, would the city pay

2369 the coupons.

Asked for leaflet showing city's financial obligations in respect to transit situation.

Oct. 14, 1919.—Letter from the Brooklyn Chamber of Commerce, 32 Court Street, making suggestions as to the solution of the transit difficulty. This letter read in part as follows:

"Despite all efforts that may be made to minimize them, the disintegration of lines that have been operated as a whole for a generation or more will make more confusion and

2370 hardship to the traveling public and to the business interests of the borough."

Dec. 17, 1919.—Letter from the Public Committee on Transportation, 141 Broadway, requesting that the comptroller appoint three gentlemen as members of this committee, and enclosing statement of the Terminal Ports Association regarding the necessity for the appointment of such a committee.

The Statement of the Terminal Ports Association suggested "service-at-cost" plan. Said

2371

Committee referred to should be formed, for the purpose of discussing and formulating plans for relief.

Dec. 30, 1919.—Letter from the Flatbush Taxpayers Association of Brooklyn (F. Cornelius Wandmacher, Executive Secretary, 1290 New York Avenue, Brooklyn), forwarding resolutions adopted at a meeting of the association. These resolutions included the following statement:

"1. The present confusing and damaging 2372
condition of transit in this City, especially in the Borough of Brooklyn, demands immediate action on the part of officials and the properly constituted authorities."

COMMUNICATIONS RECEIVED BY MAYOR HYLAN.

Jan. 2, 1919.—Letter from Albert Lange, 118 East 82nd St., commending the Mayor for opposition to increased fare.

Jan. 2, 1919.—Letter from R. D. Smith, Reading, 2373
Pa., protesting against decrease in value of the stocks and bonds of the transit companies.

Jan. 4, 1919.—Letter from Geo. A. Young, Washington, D. C., advocating taking over of roads by city. Says he owns $600,000 of N. Y. Rys. Bonds.

Jan. 6, 1919.—Statement from J. C. Van Alstyne, 71 Murray St., New York, with suggestions as to solution of transit difficulties.

Suggest Zone System.

2374

Jan. 6, 1919.—Letter from John Van Sickle, 140 Genesee St., Auburn, N. Y., requesting that the companies be allowed an increase in fares.

Jan. 7, 1919.—Letter from M. McKeon, 101 East 95th Street, N. Y., protesting against increase in fare.

Jan. 8, 1919.—Letter from W. H. Moore, 1419 Pacific Street, Brooklyn, N. Y., protesting against conditions on the B. R. T.

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Jan. 10, 1919.—Letter from F. Marsh Soper, M. D., 110 W. 34th St., N. Y., protesting against granting of any increase of fare.

Jan. 10, 1919.—Letter from John J. Wynne, 23 East 41st Street, N. Y., advocating graduated fares as a solution.

Jan. 13, 1919.—Letter from Oscar Mayer, 2085 Fifth Ave., N. Y., protesting against transit conditions.

2376

Recommending that the traction companies be granted a "fair increase" in fares.

Jan. 22, 1919.—Letter from Carl Thal, Milwaukee, Wis., protesting against decrease in value of stocks and bonds.

Jan. 24, 1919.—Letter from Wesley Wait, Newburgh, New York, protesting against transit situation.

Stated that City had no authority to divest public funds to make good deficits of traction companies.

2377

Jan. 26, 1919.—Letter from M. W. Palmer, 521 West 111th Street, N. Y., protesting against conditions.

Requested that companies be forced to establish through local service from Times Square to lower Fourth Avenue.

Jan. 29, 1919.—Letter from Joseph R. Seitz, 767 Lexington Avenue, New York, requesting that the Mayor grant increase in fare to relieve the situation.

2378

Feb. 1, 1919.—Letter from Chas. F. Noyes, 92 William Street, N. Y., with suggestions for solution of transit difficulties.

Suggested that a "self-sustaining" rate be given the transit companies.

Feb. 5, 1919.—Letter from George D. Miller, 174 South 7th Avenue, Whitestone, N. Y., protesting against any increase in fare.

Feb. 14, 1919.—Letter from J. Henry Small, 1326 Bergen Avenue, Brooklyn, protesting against transit conditions. 2379

Cars on Bergen Street line are too few, and conductors do not announce streets.

Feb. 26, 1919.—Letter from F. Sielern, 255 West End Avenue, New York, requesting that the Mayor grant increase in fare.

Feb. 28, 1919.—Letter from Wesley Wart, New York, protesting against transit situation, stating that the Mayor's reply to his previous communication was unsatisfactory.

2380

March 22, 1919.—Copy of letter from Mary A. Lennon, 311 West 24th Street, to Travis Whitney, P. S. C., approving stand of the Mayor.

March 23, 1919.—Letter from Chas. V. McKeon, 622 7th Street, Brooklyn, commending Mayor on his stand against increased fare and suggesting plan.

March 27, 1919.—Letter from Mrs. E. D. Prendergast, 419 West 118th Street (stockholder),
2381 protesting against situation.

Stock bought for $150, now selling for $13.

Asked the Mayor to "form some plan by which we shall receive justice."

April 4, 1919.—Letter from Herman A. Metz, 122 Hudson Street, enclosing copy of report of Brooklyn Chamber of Commerce.

"The position of the Chamber is this: Scrupulously fair treatment of the transit companies by the public in return for scrupulously fair treatment of the public by the transit com-
2382 panies." The transit companies had not acted fairly toward the city, the report said.

April 12, 1919.—Letter from C. J. Smith, recommending increase in fares to relieve "disgraceful" conditions of travel.

April 11, 21, 1919.—Letters from Edward Stouffer, 516 West 34th Street, protesting against decrease in value of stocks and bonds.

April 13, 1919.—Letter from R. J. Marrin, 415 5th Street, Brooklyn, protesting against conditions and suggesting operation of 'bus line

2383

April 24, 1919.—Letter from West Side Children's Welfare Conference, 302 Madison Avenue, New York, protesting against higher fares.

April 25, 1919.—Letter from West Side Children's Welfare Conference, 302 Madison Avenue, New York, protesting against discontinuance of Belt Line R. R.

June 13, 1919.—Letter from Sara McPike, 120 Broadway, N. Y. C., commending Mayor on his stand against increase in fare. 2384

June 27, 1919.—Letter from Hugh P. McKee, 43 Cedar Street, protesting against charge for transfer.

July 15, 1919.—Letter from Charles Netch, 2453 Ralph Street, East Williamsburg, N. Y., protesting against service.

July 18, 1919.—Letter from M. F. McDonough, 223 South Front Street, Philadelphia, protesting against conditions of bondholders and stockholders. 2385

July 22, 1919.—Letter from Mary A. Lennon, 311 West 24th Street, commending Mayor on his stand.

July 20, 1919.—Letter from W. E. Thayer, 38 West 68th Street, demanding that the Mayor prevent any increase in fare.

July 20, 1919.—Letters from W. R. Wright, R. R. Wright and Sidney G. Wright, 2015 52nd Street, Brooklyn, protesting against charge for transfer or increase in fares.

2386

Aug. 1, 1919.—Letter from Thos. Lang, 217 Flatbush Avenue, Brooklyn, commending the Mayor for opposition to increased fare.

Aug. 1, 1919.—Letter from Philip Young, 182 Bond Street, Brooklyn, protesting against charge of 2¢ for transfer.

Aug. 3, 1919.—Letter from "I. V. P.," 141 East 50th Street, New York, protesting against conditions and charge for transfer.

2387

Aug. 4, 1919.—Letter from M. F. McDonough, 223 South Front Street, Philadelphia, protesting against conditions of bondholders and stockholders.

Aug. 6, 1919.—Letter from H. G. Schneider, 610 West 47th Street, commending Mayor on installation of bus lines.

Aug. 7, 1919.—Letter from residents of City Island (Henry B. Nevins and others), protesting against discontinuance of City Island line.

2388

Aug. 8, 1919.—Letter from Elmer Lee, stating that the Mayor's plan for bus lines was a good idea.

Aug. 8, 1919.—Letter from Samuel W. Taylor, 176 Fifth Avenue, commending Mayor on installation of bus lines.

Aug. 9, 1919.—Letter from Edward W. Simonds, 541 West 142nd Street, protesting against granting of any increase in fares.

2389

Aug. 12, 1919.—William H. Robinson, 120 Broadway, protesting against decrease in value of stocks of I. R. T.

Aug. 16, 1919.—Letter from James R. Troland, 237 West 66th Street, commending Mayor for installation of Bus lines.

Aug. 17, 1919.—Letter from H. Trumbauer, 160 Fifth Ave., protesting against service and commending Mayor on his stand for Municipal ownership.

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Aug. 17, 1919.—Letter from N. Paguit, Brooklyn, protesting against transit conditions.

Aug. 19, 1919.—Letter from John P. Quin, 157 St. Ann's Ave., Bronx, protesting against conditions and commending the Mayor.

Aug. 20, 1919.—Letter from Arthur D. Price, 1529 Flatbush Ave., protesting against conditions and making suggestions.

2391

Aug. 20, 1919.—Letter from A. W. Lyman, 221 Albemarle Road, Brooklyn, commending Mayor on his stand against increased charges and making suggestions.

Aug. 14, 1919.—Letter from Alex. Sacks, 139a Union St., Brooklyn, requesting that companies be allowed to charge higher fares.

Sept. 5, 1919.—Letter from Walter N. Polovak & Co., 31 Nassau Street, suggesting that transit companies cut down operating expenses.

2392

Sept. 11, 1919.—Letter from R. T. Maitland, commending Mayor and protesting against conditions.

Sept. 11, 1919.—Letter from Robert L. Mott, Richmond Hill, protesting against conditions and making suggestions.

Sept. 12, 1919.—Letter from Alex. Sacks, 139a Union St., Brooklyn, requesting that companies be allowed to charge higher fares.

2393

Sept. 23, 1919.—Letter from Sterling Wallace, 65 Frankfort Street, N. Y., approving bus lines.

Sept. 25, 1919.—Letter from Edward Francis Rochm, 29 Liberty Street, commending the Mayor on stand against increase in fares.

Sept. 26, 1919.—Letter from H. J. McCarthy, 463 59th St., Brooklyn, protesting against conditions on B. R. T.

Crowding at Canal Street station on Fourth Ave. Subway. B. R. T. runs an insufficient number of trains and at too long headway.

2394

Sept. 28, 1919.—Letter from Dr. Alex. Rosenthal, 51 East 96th Street, approving installation of bus lines on East side.

Oct. 1, 1919.—Pamphlet issued by Real Estate Owners' Protective Ass'n, commending the Mayor and Board of Estimate and Apportionment on their stand against increased fare.

Oct. 16, 1919.—Copy of resolution of Sheepshead Bay Regular Democratic Ass'n, against increase in fares.

2395

Oct. 19, 1919.—Copy of resolution of Kings Highway Board of Trade, 1701 Kings Highway, requesting introduction of bus lines.

Oct. 21, 1919.—Copy of resolutions by Douglaston Civic Ass'n., urging solution of the transit problem.

"Whereas, a solution of the transit problem is immediate and profound importance to the entire city."

All public officials urge to "undertake consideration of the disposition of the transit problem." 2396

Jan. 9, 1918.—Letter from John V. Donahue, Madison Ave. & 63rd St., New York City, commending the Mayor on his stand with regard to the traction situation and suggesting that the City of New York take over the traction properties.

Jan. 6, 1919.—Letter from J. C. Brackenridge, 95 Liberty St., N. Y., recommending that a Receiver to represent the City's interest should be appointed in the B. R. T. matter. 2397

Jan. 10, 1919.—Letter from E. Hubuer, 41 St. Paul Place, Brooklyn, protesting against an increase in fares while Mr. Shonts continues to "draw $100,000 a year salary."

Jan. 11, 1919.—Letter from John J. Hopper, 215 W. 125th St., N. Y., congratulating the Mayor on his vote denying an increase of fare, stating in part "These companies enjoyed the fat years, now let them take the lean like every other business has to do."

2398

Jan. 3, 1919.—Letter from "Bondholder and Stockholder," protesting against traction situation and recommending that an increase in fare be granted.

Jan. 13, 1919.—Letter from the New York Board of Trade & Transportation, requesting that a representative of the City Administration appear at a meeting of the Board's Transit Conference, to be held on January 16th.

2399 Jan. 22, 1919.—Letter from John Finck, 198 Broadway, enclosing suggestions for solution. The letter, in part, says: "If both sides will take a dispassionate view, much can be accomplished to ameliorate the present unfortunate situation."

Jan. 25, 1919.—Letter from Charles V. Halley, Jr., 505 Tremont Avenue, criticising the Public Service Commission for its action with respect to the increase of fares and asking for an interview.

2400

Jan. 28, 1919.—Letter from Laurence S. Folger (Colonial Audit Co.), 38 Park Row, enclosing copy of letter to Shonts and stating: "My only regret is that my limited vocabulary and the restrictions of the Post Office authorities make it impossible for me to do justice to the subject."

The final paragraph of his letter to Shonts reads as follows:

"Take my advice—read the handwriting on the wall—the combined power of the laboring element and those who have seen military serv-

2401

ice will no longer permit men like you to crowd them, like cattle, into your cars, wringing the fares from them, giving abominable service, and then—like Oliver Twist, asking for more."

Jan. 31, 1919.—Letter from the Associated Civic Associations of Brooklyn, 1 Greene Avenue, Brooklyn, stating that at the next regular meeting, the B. R. T. transit situation will be discussed.

Jan. 31, 1919.—Letter from A. L. Greggs, suggesting that a system of zone fares be instituted. 2402

Feb. 4, 1919.—Letter from W. Braunsdorf, 457 Myrtle Avenue, Flushing, N. Y., stating that the seven cent fare league, being formed in Flushing, was really in league with the North Shore Traction Co., and that the company could exist with the five cent fare, if its employees were honest or were properly supervised. He stated that from actual observation, he could say that 30% of the revenue of fares was stolen by employees. 2403

Feb. 22, 1919.—Letter from John E. Hanifen, Philadelphia, Pa., stating that he is a stockholder in the Interborough Rapid Transit and approving plea for eight cent fare.

Feb. 24, 1919.—Letter from E. C. Kinner, Orleans, Vt., stating that he is an owner of I. R. T. stock and asking that an increase in fare be granted.

Feb. 24, 1919.—Letter from Wintwood Ball, Chatham, N. Y., petitioning Mayor for an increase of fare to the Interborough.

2404

Feb. 25, 1919.—Letter from Geo. G. Gillett, Pottsdam, N. Y., stating that he had all his money invested in I. R. T. bonds and asking that the company be granted an increase in fare.

Feb. 26, 1919.—Letter from S. G. Hess, 1 West 94th Street, requesting that an increase in fare be allowed the traction company.

Feb. 26, 1919.—Letter from Arthur M. Hess, 31 East 83rd Street, New York, petitioning the
2405 Mayor to grant the increase of fare requested by the I. R. T.

Feb. 27, 1919.—Letter from D. Dickinson, New Brighton, N. Y., urging that the Mayor refuse to grant petition of the I. R. T. for an increase in fare.

Feb. 28, 1919.—Letter from Samuel J. Baxter, 115 Broadway, petitioning the Mayor for an increase in fare to the Interborough.

2406 March 3, 1919.—Letter from John G. Hunt (no address), ex-service man, stating that his entire savings were invested in stock of I. R. T., protesting against refusal of city to grant increase.

March 5, 1919.—Letter from Wm. Jay Garrity (Continental Newspaper Syndicate), 447 East 58th Street, stating "The public of the City of New York travel daily on the different conveyances of the city, i. e., elevated railroad, subway, the street car, etc., and are confronted with a situation that is entirely unde-

2407

sirable," etc., and suggesting that the city take over the transportation lines and run them without charging a fare, and that the carrying charges be covered by assessment and taxation.

March 10, 1919.—Letter from Frank S. Gardner, secretary of the New York Board of Trade and Transportation, stating that an association named "The New York City Transit Conference" had been formed for the purpose of investigating conditions of the Transit Co., and 2408
that a sub-committee had been pointed to confer with the Mayor and the Comptroller.

March 7, 1919.—Letter from Charles T. Gwynne, secretary of the Chamber of Commerce of the State of New York, enclosing copy of report of the transit situation adopted by the Chamber of Commerce at its monthly meeting. The resolution read as follows:

"RESOLVED, That the Chamber of Commerce of the State of New York does hereby 2409
communicate to the authorities of the City and State the feeling of its members concerning the seriousness of the situation presented and requests them to hasten such measures of relief as will remove the existing menace to the credit, the convenience and the growth of the cities which are involved, in recognition of the economic fact that transportation cannot be rendered at less than cost without imposing undue burdens upon taxpayers, security hold ers and the traveling public."

2410

March 20, 1919.—Letter from J. G. Johnson, Reading, Pa., stating that the traction companies have not been given a "square deal" by the city.

March 16, 1919.—Letter from Louis W. Fehr, 147 West 118th Street, New York, asking whether statement of traction companies that unless fares are raised city will have to pay interest on subway construction bonds by taxation, is true.

2411

April 1 and 7, 1919.—Letters from the Law and Order Union of New York City, 15 William Street, New York, asking for an interview with regard to the traction situation

April 20, 1919.—Letter from Wm. J. Kelly, 4 Magnolia Avenue, Jersey City, stating in part "The management of the New York Railways Co. is so absolutely rotten that dozens of improvements can be picked up at any time."

2412

May 7, 1919.—Letter from the Bureau of Municipal Research, 261 Broadway, enclosing copy of a report on the transit situation of Boston, prepared by a member of its staff.

June 27, 1919.—Letter from Miss Mary F. Fox, 390 Hart Street, Brooklyn, stating that discharge by B. R. T. of women employees was purely a political move to discredit the Mayor and the Governor.

July 1, 1919.—Letter from John Tyrone Kelly, editor of the Saturday Sentinal, 550 West 167th Street, protesting in the name of the

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residents of Ft. Washington Avenue, against the granting of a franchise for a bus line through that street.

July 9, 1919.—Letter from J. J. Chambers, president of the 28th Ward Tax Payers' Protective Association, expressing his hope that the Mayor would be successful in preventing the transit companies from receiving an increase in fare.

July 19, 1919.—Letter from H. A. Glasmacher, 72 Trinity Place, New York, suggesting that bus lines be installed to take the place of street cars, and referring to the bus lines operated in London. 2414

July 26, 1919.—Letter from Alfred J. Hale, 245 East 120th St., stating that Municipal Ownership is the only solution of the transit difficulties.

Aug. 2, 1919.—Letter from James J. Jones, 15 Park Row, enclosing copy of letter sent to Public Service Commission protesting against the discontinuance of the Staten Island Transfer. 2415

Aug. 14, 1919.—Letter from Geo. E. Berna, New York City, protesting against any increase in fare, stating that the traction companies were greatly over-capitalized.

Aug. 18, 1919.—Letter from Dorothy Godfrey, 267 W. 139th St., suggesting that the City take over the Transit Lines, stating that the public would then willingly pay an increased fare if necessary.

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Sept. 2, 1919.—Letter from J. Henry Falk, 68 W. 116th St., protesting against increase in the fare, and stating that increased revenue of transit companies is almost enough to cover increased wages, etc.

Sept. 1, 1919.—Letter from A. Hartung, 420 East 85th St., requesting that no increase in fare be granted.

Sept. 2, 1919.—Letter from Patrick Herlihy, 58
2417 No. 8th Ave., Whitestone, Long Island, expressing gratitude for the "honest and fearless" attitude of the Mayor and condemning the action of Commissioner Nixon in allowing an increase in fares.

Sept. 2, and Sept. 19, 1919—Letters from the Institute for Public Service, 51 Chambers St., asking for an interview for the purpose of discussing the traction situation.

Sept. 3, 1919.—Letter from John Jones (no ad-
2418 dress), suggesting that the Mayor ascertain "what becomes of the millions of dollars which the Interborough Company gets for the advertisements in the trains of the subways and elevated."

Sept. 5, 1919.—Letter from I. T. Flatto, 261 Broadway, enclosing an affidavit for use by the Mayor in connection with the opposition to an increase in fare granted by the Public Service Commission on the North Shore Traction Co. line. The affidavit in short stated that an investment made by Mr. Flatto in

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buildings and property on the line of the North Shore Traction Co., in Flushing would be jeopardized by the increase.

Sept. 16, 1919.—Letter from Ernest Harvier, 1193 Broadway, enclosing clipping from Knickerbocker Press of Albany, stating that the Albany Chamber of Commerce had requested the Public Service Commission to require the traction companies to show that they had exhausted all other means of increasing their revenue, before they should be allowed an increased fare. 2420

Sept. 16, 1919.—Letter from Benj. Fitch, 94 Hick St., Brooklyn, suggesting institution of zone system as a solution of the difficulties of the I. R. T.

Sept. 5, 1919.—Letter from Margaret E. Craig, 1718 Metropolis Ave., Richmond Hill, Long Island, protesting against charge for transfers and stating "I hope you will consider the heartlessness of this company when they try to oppress the City of New York in granting an increased fare. 2421

Sept. 18, 1919.—Letter from Louis J. Frank, Supt. of Beth Israel Hospital, New York, protesting against the discontinuance of the Madison Street Car Line, stating in part "No consideration was taken of the necessity of this line of transportation to the toiling masses who live in this densely populated section," and also stating that such action tended to breed Bolshevism.

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Sept. 19, 1919.—Letter from Wm. Edwards, 720 Beck St., New York, protesting against conditions of travel in the subway and stating in part: "Today, all we can get from the I. R. T. Co., is the Subway Sun, and the camouflage it contains in the way of paving the way for as high a fare as they can get, and, Sir, we may thank you that we are not paying it."

Sept. 22, 1919.—Copy of letter of Saml. L. Fleischman (no address), to "My dear Governor" stating that the discontinuance of the east side car lines was a bluff and suggesting that the lines be bought and operated by some person of means.

2423

Sept. 24, 1919.—Letter from J. R. Bowman, 328 Brandywine Ave., Schenectady, N. Y., stating that increased cost of commodities and service throughout the country warranted the granting of an increase in fares to New York City Traction Co.

Oct. 2, 1919.—Copy of letter of Miss E. Gorman (no address) to Commissioner Nixon, requesting that an increase of fare be granted the companies, or at least that a vote of the people of the City of New York be taken on the question.

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PUBLICATIONS IN THE PRESS.

May 13, 1919, Standard Union; May 14, 1919, Evening World.—Headline "No Justification for Double Fare." Statement by Dist. Attorney Lewis, commenting on test case brought by members of Borough Park Heights Civic Association to test 10¢ Coney Island fare.

2425

May 15, 1919, Brooklyn Times.—Meeting of 28th Ward Taxpayers Association in protest against conditions.

June 18, 1919, Standard Union.—Meeting of Bay Ridge Merchants Ass'n, addressed by Maxwell S. Harris, president of Borough Park Civic Ass'n, recharge of 10 cents fare to Coney Island.

June 19, 1919, Journal.—Headline "24 Bodies in central Brooklyn to fight foes of transit relief." 2426

"Organizations affiliated with Associated Civic Ass'n:

Taxpayers Protective Ass'n of Brooklyn.
Fulton Street Board of Trade.
East Brooklyn Citizens Ass'n.
Bedford and Hill Taxpayers Ass'n.
Utica Heights Board of Trade.
Bedford and Park Ave. Board of Trade.
Classan Ave. Sewer Assessment Protest Ass'n.
Brevoort Taxpayers Ass'n.
Atlantic Ave. and Brooklyn Improvement Ass'n. 2427
24th Ward Board of Trade.
Sterling Protective Ass'n.
United Property Owner's Ass'n.
Bedford Heights Board of Trade.
Fulton Street Protective League.
Central Citizens League.
Washington Avenue Ass'n.
19th Ward Improvement Ass'n.
Franklin Board of Trade.
Gravesend Beach Board of Trade.

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Associated Motion Pictures Exhibitors of Brooklyn and Long Island.
Garage Owner's Board of Trade.
Brooklyn Motor Vehicle Dealer's Ass'n.
Highland Park South Civic Ass'n.
Teachers Welfare League of Brooklyn.
Men's Club of Bethany Presbyterian Church and a dozen others."

2429

June 19, 1919, Eagle.—Reports "vigorous protests by civic organizations, real estate operators and business men" over plan of New York & Queens County Ry. Co. to abandon its service over Queensboro Bridge.

June 13, 1919, Evening World.—Business interests and taxpayers' associations of Staten Island protest against discontinuance of Staten Island ferry transfers.

2430

June 10, 1919, Eagle.—Report of arrest of three members of Borough Park Civic Association for refusal to pay 10 cent fare to Coney Island. Defendants insisted on hearing before magistrate to make a test case.

(On May 11, 1919, Sidney Kaufman of 1254 41st Street, David Carson of 1362 46th Street, and Samuel Soacki of 1211 41st Street, refused to pay the second fare at the West End Terminal at Coney Island, and jumped over the turnstile. Their arrest was caused by Benjamin Banks, a special officer of the B. R. T., who also accused them of having caused a crowd to collect and shouted to other passengers to refuse to pay the second fare. After several adjournments and when the case was called on

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June 10, Harold B. Warmer appeared for the B. R. T. and offered to withdraw the complaint if the defendants would sign an agreement not to sue the company for causing their arrest. Maxwell S. Harris, the attorney for the three men, refused the B. R. T.'s offer and insisted that the question of the right of the company to charge the second fare be tried before the magistrate. Magistrate O'Neil said he would not go into the fare question. On August 27th Magistrate O'Neil in the Coney Island Court discharged the three men on the ground that the charge of disorderly conduct had not been proven. He again refused to consider the second fare question.)

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Aug. 1, 1919, Herald.—Meeting of Straphangers' Association sent resolution to Gov. Smith, protesting against two cent transfer charge and demanding investigation.

This association was composed mostly of members of McKinley Park Board of Trade and Fourth Avenue Subway League.

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Aug. 1, 1919, Globe.—"Car Riders Rage at No Transfer."

"Conductors and passengers in constant wrangle."

"Puzzles confronted travellers in all parts of the city."

"Many ride on elevated to escape payment of two cents."

"In South Brooklyn conductors experienced much difficulty in conveying to foreigners some understanding of new charge."

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Aug. 7, 1919, American.—"Many members of civic associations announced determination of calling meetings of these organizations to endorse Mayor Hylan's proposition" (re bus lines).

Aug. 9, 1919, Journal.—Broadway Association urges use of buses on Broadway.

Aug. 9, 1919, American.—Central Federated Union demands removal of Garrison as receiver.

2435 Aug. 11, 1919, American.—Central Federated Union (representing 500,000 workers) approves bus plan.

Aug. 13, 1919, American.—Attorneys offer services to Straphangers' Protest Association in fight against two cent transfer charge.

Aug. 13, Standard Union, Brooklyn Times.—Transit League of Southern Brooklyn urges installation of bus lines.

Aug. 20, 1919, Tribune.—"The man who rides is
2436 well satisfied with the strike settlement, but he is ready to make a vigorous protest if the car men's increased pay must come out of his pocket in the form of an eight cent fare."

July 12, 1919, N. Y. American.—"Central Federated Union, representing organized labor in New York, demands municipal ownership as a protest against two-cent transfer charge. Protested to Mayor Hylan, Gov. Smith and Judge Mayer."

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July 17, 1919, Standard Union (Editorial).—"Is it any wonder the people are skeptical? When they are told the car companies are bankrupt and cannot make ends meet unless permitted to dip into the pockets of the public and take more millons out, they think of what the same set of men, or their immediate predecssors, did with great railroad properties in the past. And what guarantee is there the same thing will not be done over again."

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July 19, 1919, Standard Union (Editorial).—"The people protest against the seven cent fare in vain."

July 21, 1919, Evening World.—"W. J. Mackin, president of the Bath Beach Taxpayers Association, announced that a meeting of the organization would be held Wednesday night to discuss the order of Public Service Commissioner Nixon, permitting a charge of two cents for each transfer.

"An effort is being made to crystallize sentiment for a gigantic mass meeting in Brooklyn to protest against the two cent charge for transfers."

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July 30, 1919, New York American.—"Mass meeting of protest held at Brooklyn Public Library, Bushwick and DeKalb Avenues, under auspices of Allied Board of Trade and Taxpayers' Association of Brooklyn. Mayor Hylan and others spoke. Committee appointed to call a meeting of all civic organizations in Brooklyn to fight two cent transfer."

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Sept. 11, 1919, N. Y. American.—District No. 15 of International Association of Machinists appoint committee of 100 to aid Mayor Hylan in fight against higher fares. Committe represented membership of 20,000.

Sept. 12, 1919, Tribune, Herald.—Shut down of storage battery lines will inconvenience 250,000 people.

Sept. 2, 1919, Evening Sun.—"New Yorkers got
2441 another hard blow in the transportation belt by a second decision of the Federal Court yesterday. This was in the form of an order from Judge Mayer, which provided that the Ninth Avenue surface line should be severed from the unified system of the New York Railways. * * *."

Sept. 12, 1919, Citizen (Editorial).—After describing abandonment of storage battery lines said:
"In the meantime large part of the East side will walk. But even if the Mayor succeeds in establishing a bus system, the 3,500,
2442 000 transfer passenger on the East Side will have to pay a double fare in the future."

Sept. 12, Standard Union.—13th Assembly District Taxpayers Ass'n., protest against raising of fares, and pledged aid to Mayor Hylan.

Sept. 13, 1919, Post.—Quoting Mayor Hylan:
"The responsibility of closing down these lines rests entirely on Judge Mayer of the Federal Court, and the Receiver, Job Hedges."

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Sept. 16, 1919, Sun.—"Much confusion was caused among Staten Islanders having business in Manhattan, or vice versa, yesterday because of a suspension of the arrangement whereby transfers were exchanged between the city ferry boats and the New York City railways cars at the Battery."

Sept. 17, 1919, Times (Brooklyn).—Mass meeting under auspices of Associated Civic Associations of Brooklyn at Apollo Hall, Sept. 16.

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Sept. 18, 1919, Sun.—Harriet Watson, brought suit in Supreme Court to restrain the N. Y. & North Shore Traction Co., from charging more than five cents.

Sept. 18, 1919, Tribune.—Mass meeting under auspices of Community Councils of National Defense, to be held Sept. 18, at Public School, at Hester and Essex Streets, to protest against abandonment of storage battery lines.

Sept. 18, 1919, N. Y. American, Herald, Sun.— 2445
Committee of East Side citizens, headed by Magistrate Blau, called on Judge Mayer and protested against shutting down of downtown crosstown lines.

Sept. 18, 1919, N. Y. American, Herald, Sun.—"Residents of the East Side will protest at a mass meeting to-night * * *. The meeting will be held under auspices of the Community Councils of National Defense in Public School No. 62, Hester and Norfolk Streets."

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Sept. 19, 1919, Tribune.—(Above meeting held).

Sept. 18, 1919, Evening World.—Downtown Chamber of Commerce, voted to send representative to Mayor Hylan to request bus service. "Otherwise there is nothing to do but submit to the piracy of the traction interests and agree to pay an increased fare. We cannot permit the East Side, with a million people, to be shut off from the rest of the world."

2447 Sept. 18, 1919, Standard Union.—"Vigorous protests over the abolition of transfers between the elevated and subway lines, as mentioned in the order of the B. R. T., to become effective Oct. 16, were made today by citizens in the sections affected. The proposed action was condemned in no uncertain terms and was declared to be inconsiderate and harsh and likely to work untold hardships upon those unfortunate enough to live in the districts which will be affected."

"When the order granting the B. R. T. the
2448 right to charge an extra two cents for transfers went into effect, there was much objection to it and angry denunciation of the company, but finally the indignant citizens paid. Now, when the last of the free transfers from 'L' and subway lines are abolished and a flat charge of an extra fare is asked, the protests are most bitter."

The following associations registered protest:

Flatbush Chamber of Commerce.
Bay Ridge Chamber of Commerce.
Bay Ridge Merchants' Association.
South Midwood Residents' Association.

2449

Sept. 19, 1919, N. Y. American.—Meeting of Non-Partisan Vigilance Committee at City Hall.

Sept. 20, 1919, N. Y. American.—Committee formed. Decided to hold meetings in all boroughs.

Sept. 19, 1919, Evening Sun (Editorial).—"No; the workman must walk. He must add a tramp of perhaps two miles or more a day to his journey to or from work. That means getting started earlier and home later. If he 2450
can reach some other crosstown line by a shorter walk he will have the pleasure of paying an extra two-cent fare for his transfer."

Sept. 20, 1919, N. Y. American.—Report of installation of bus service.

"While the East Side is deeply grateful to Mayor Hylan for his quick action in supplying its transportation needs, it is no less indignant at the brutal treatment accorded to it by 'Let the East Side Walk' Hedges."

Committee called on Hedges to protest, 2451
Harry Kopp, lawyers, reported as saying

"* * * Nothing has aroused so much dissatisfaction among my people, and nothing has done more to undermine what we have been trying to teach them in the last few years than the withdrawal of these crosstown lines. It has increased the spirit of unrest."

Sept. 22, 1919, Citizen.—"Throughout Brooklyn great dissatisfaction is reported at the prospect of residents of the suburban districts being obliged to pay two, and in some instances

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three fares. A meeting of various civic organizations is to be held soon to protest against the reversion of the lines at the office of the Brooklyn City Railroad Company."

Sept. 22, 1919, Evening World.—"The discontinuance today of the four storage battery lines has caused great dissatisfaction in the lower east and west sides.

Sept. 30, 1919, N. Y. American.—"It was learned
2453 last night that residents of Brooklyn are to make strong protest against the order of Judge Mayer and the prospect of being called upon to pay additional fares.

"Herbert Low, president of the Flatbush Chamber of Commerce, has called a special meeting of that organization for to-morrow night to discuss the disintegration of the surface lines and the fare question."

Sept. 30, 1919, Brooklyn Times.—Headlines: "B. R. T. Dissolution, With 10 & 15¢ Fares,
2454 Angers Whole Borough; Indignation Meetings Called.

"Great indignation was expressed throughout Brooklyn today over the results which appear certain to follow yesterday's action of Judge Mayer.

"It was the one topic of conversation * * * among the local trolley riders this morning on their way to business * * *.

"This morning various board of trades and taxpayers' association officials were in conference to decide whether meetings should be called to protest against the big fare in-

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creases which appear imminent, and it is not improbable that a great mass meeting of the associated bodies may be held."

Sept. 30, 1919, Citizen (Editorial).—"* * * And to think that all this *chaos* and litigation could have been avoided if politics had been kept out of the matter. * * *

Sept. 30, 1919, Citizen.—"The traveling public in Brooklyn is awaiting with keen interest the decision of the company, and it seems likely that meetings will be held throughout the borough to protest against the exacting of two and three fares where one is now paid." 2456

Oct. 1, 1919, New York American.—Meeting of Flushing United Association in protest against traction situation.

Oct. 1, 1919, Sun.—"* * * While Brooklynites, wrathful at the prospect of paying 10 or 15 cents for car rides hitherto retailing for 5, were looking around yesterday for somebody to blame, President T. S. Williams of the B. R. T., in common with others, pointed to city officials." 2457

Passengers' Protective Association, Flatbush Chamber of Commerce and other citizen organizations held meetings of protest.

Oct. 1, 1919, New York American.—Public meeting of protest held in headquarters of Peter J. McGuinness, Democratic candidate for alderman, 18th District.

John B. Johnston, candidate for District Attorney; James J. Brown, candidate for sheriff, and others spoke.

2458 **Defendant's Exhibit "W."**

MEMORANDUM OF JUDGE MAYER.

Dec. 27/19.

P. 7.

"As the result of these and other proceedings, hundreds of transfer points were eliminated and millions of passengers are now compelled to pay at least 10 cents where they heretofore paid 5 or 7 cents.

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P. 7.

"In addition it became necessary to order the temporary discontinuance of certain lines serving millions of passengers annually."

* * * * * * * *

P. 8.

"In addition to the foregoing, it has been impossible to keep the maintenance up to the standard which the court and the receivers desire or to give
2460 the service to which the court and the receivers feel the public is entitled."

P. 12.

"4. Surface lines in Manhattan and Brooklyn disintegrated with extra fares, largely decreased transfer points and some important routes temporarily discontinued."

Exhibit F to Petition for Writ— Opinion of Judge Mayer. 2461

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

UNITED STATES OF AMERICA,
Plaintiff,

against

CHARLES L. CRAIG,
Defendant. 2462

FRANCIS G. CAFFEY, United States Attorney, BEN A. MATTHEWS, Assistant United States Attorney, for the United States.

JOHN P. O'BRIEN, Corporation Counsel (EDMUND L. MOONEY, CHARLES T. B. ROWE, ALFRED B. CRUIKSHANK, RUSSELL LORD TARBOX and ELI S. WOLBARST, of Counsel), all of New York City, for defendant. 2463

Mayer, District Judge:

On October 1, 1919, Lewis Nixon, then Public Service Commissioner addressed identical letters to the members of the Board of Estimate and Apportionment of the City of New York, to Receivers appointed by this Court, to transit officials and to representatives of security holders inviting them to attend a conference to be held at the office of the Public Service Commission at 10:30 of the morning of October 6, 1919.

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Defendant received one of these letters, a copy of which is annexed as Appendix A.

On October 6, 1919, at 10:40 A. M., as appears from the minutes of the Public Service Commission, the conference began but defendant was not among those present.

After some discussion, it was concluded by the Public Service Commissioner, in response to views expressed by the Transit Construction Commissioner that a full and free consideration of the subject matter and the questions involved could more
2465 effectively be undertaken in a closed conference and thereupon, as the minutes state, "various spectators and newspaper men left the room."

After this had occurred, further discussion took place and then the Public Service Commissioner said: "I have received a letter from Mr. Craig, the Comptroller, and I think I will read it as explaining his reasons for not meeting here with us."

The letter referred to was thereupon read by the Public Service Commissioner. A copy is hereto attached as Appendix B.

Thereafter, and on the same day, October 6, 1919,
2466 the court filed the following order:

> "It is hereby ORDERED that the United States Attorney advise the court by formal information concerning the conduct of one Charles L. Craig on October 6, 1919, at which time he is reported to have published or caused to be published a written communication addressed to Hon. Lewis Nixon, Public Service Commissioner, No. 49 Lafayette Street, New York City, concerning the orders and action of this court in a pending cause or causes."

2467

On November 3, 1919, the United States Attorney filed an information charging defendant with contempt of court. After a recital of the facts, the information alleged, among other things, the following:

"1. In said letter it was stated that this Court in the said suits and proceeding was responsible for a policy of denying to the defendant and to other members of the Board of Estimate and Apportionment of the City of New York any access to original sources of information concerning the property and affairs of the various public utility corporations in the hands of receivers appointed by this Court and holding franchises to operate in the streets of New York; whereas, in truth and in fact this Court never adopted such a policy, but on the contrary afforded to the defendant and to all members of the Board of Estimate and Apportionment of the City of New York access to the said original sources of information and every facility for obtaining information concerning the property and affairs of the said corporations and expressly directed that the City of New York and its officials should have access to such information, and in truth and in fact at no time since this Court assumed jurisdiction of any of said corporations as aforesaid has this Court or any one acting under its authority ever denied to the defendant or to any member of the Board of Estimate and Apportionment, or to any authorized representative of the City of New York or of any of its officials, access to original or to any other

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sources of information concerning the property or affairs of any of said corporations.

2. In said letter it was stated that this Court made orders which precluded any application being made by the authorities of the City of New York to any other Court or Judge for any right of examination into the affairs or conditions of the said public utility corporations; whereas, in truth and in fact this Court has never made any such order, and on the con-
2471 trary, prior to the writing of said letter, this Court expressly ordered and directed that there should be given to the authorities of the City of New York every opportunity and facility for making such examination.

3. In said letter it was stated that the orders of this Court denied to the authorities of the City of New York the opportunity to ascertain the truth; whereas, in truth and in fact this Court has never made any such order, and has never made any order that has, has had, or could have such effect, but on the contrary
2472 prior to the writing of said letter this Court ordered and directed that there should be afforded to the authorities of the City of New York every opportunity and facility for ascertaining the truth.

4. In said letter it was stated that an order of this court stands between the public and the truth; whereas, in truth and in fact no order that this Court has made has, has had, or could have such effect, but on the contrary every order in the above mentioned suits and pro-

ceeding tended and was designed to place the public in possession of the truth, and prior to the writing of said letter this Court expressly ordered and directed that every facility be afforded to public officials and citizens' associations to satisfy themselves in respect of the financial and other conditions existing in relation to the corporations in charge of said receivers."

It was then alleged that, "All of the foregoing statements in said letter, numbered from 1 to 4 2474
inclusive, and each of them, are and were false and were known by the defendant to be false when made and were made in reckless disregard of the truth."

Thereafter, an order to show cause was signed by the Court requiring defendant to show cause on December 2, 1919, "why he should not be declared and adjudged in contempt of this court by reason of the facts set forth in the said information."

Counsel for defendant appeared specially and raised certain questions as to the jurisdiction of the court, which were decided adversely to defendant. The opinion of the court in this regard was dated 2475
December 23, 1919. The court then set December 29, 1919, as the date for the appearance of defendant.

Defendant's next step was to demur to the information on twenty-eight grounds. The court overruled the demurrer and filed its opinion, dated March 8, 1920, in respect of the questions raised by the demurrer and ordered defendant to plead to the information on March 15, 1920, *United States* vs. *Craig*, 266 F. R., 230.

Defendant pleaded not guilty and the trial of the case began on May 10, 1920, and was concluded

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on June 10, 1920. The testimony is transcribed in 791 pages of stenographer's minutes and the exhibits are many and voluminous. In response to the request of counsel and in view of the length of the record and the many exhibits, the court set a date in the Fall for the submission of briefs. Extensions beyond the original date set were asked for and granted. The reply brief of defendant is dated October 30, 1920, and briefs were finally submitted to the court shortly thereafter.

2477 In *United States* vs. *Craig, supra,* the Court pointed out the grounds upon which the letter of defendant, considered by itself, must be regarded as contemptuous in certain respects. There are certain parts of the letter which are within the domain of free and permissible criticism. There are certain other parts which are not.

In the opinion, *supra,* the court stated, among other things:

> "The proceeding against defendant is brought under Section 268 of the Judicial Code which is in part as follows:
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> 2478 'The said courts (United States Courts) shall have power * * * to punish, by fine or imprisonment, at the discretion of the Court, contempts of their authority. Provided, That such power to punish for contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice. * * *'
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> * * * * * * * *
>
> The right to criticize the correctness of the decisions of courts and judges has always ex-

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isted under our form of government and must continue to exist, not merely as a right possessed by the individual but as a safeguard to our institutions. * * *

But such right must not be confused with the 'the misbehaviour * * * so near' the presence of the court 'as to obstruct the administration of justice.' Of this latter conduct the following from the letter of October 6, 1919, is a sufficient illustration:

'Before any such conference can be seriously considered, and as an evidence of good faith on the part of those acting by and under the authority of United States District Judge Mayer, there must be a reversal of the policy for which Judge Mayer is responsible, of denying to myself and other members of the Board of Estimate and Apportionment any access to original sources of information concerning the property and affairs of these various public utility corporations holding franchises to operate in the streets of New York.'

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* * * * * * * * *

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Read with the entire context, there is no escape from the conclusion that the letter in this respect charged a court of justice with adopting a policy which denied to public officials access to original sources of information to which such public officials were entitled. On demurrer, the court can look only to the face of the writing and is not enlightened as to what was in the mind of the defendant as distinguished from what was expressed by him in writing.

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Such a charge is, indeed, grave. If true, the court which sanctions such a course is rightly subject, at least, to serious criticism. If false, he who is responsible for the utterance, has undertaken a serious responsibility in publishing that which, if believed, must bring a court into contempt and distrust and in any event must create doubt in the minds of the uninformed as to the propriety and right of the court's conduct.

* * * * * * * *

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It must be plain that 'policy' means a concontinuing course in a pending cause and the alleged false statement in respect thereof looked to the present and the future as well as the past. But, it is not necessary to place the decision of this question on either narrow or technical ground. The question is broader and reaches further.

Such statements as are alleged in the information to be knowingly false have, for their purpose and expected effect, the creation of a fear in the mind of the court that it will in-

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vite popular distrust and perhaps condemnation if it continues the course which it has pursued. The assault is based on the assumption—fortunately rarely correct—that the court will shape its decisions to meet passing popular approval and to avoid passing popular criticism. It is intended to play on human frailty and to deflect and deter the court from the performance of its duty and drive it into a compromise with its own unfettered judgment by placing it, through the medium of knowingly false assertion in a wrong position before a public which has little opportunity

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to investigate the facts and ascertain the truth.

Such conduct, however futile in its results, clearly constitutes 'an obstruction to the administration of justice.' * * *

The question is not whether, as matter of fact, the court has been or will be deterred from the performance of its duty; but, as said by Mr. Chief Justice White:

'The test, therefore, is the character of the act done and its direct tendency to prevent and obstruct the discharge of judicial 2486
duty. * * *'

'Again, it is said there is no proof that the mind of the judge was influenced or his purpose to do his duty obstructed or restrained by the publications and, therefore, there was no proof tending to show the wrong complained of. But here again not the influence upon the mind of the particular judge is the criterion but the reasonable tendency of the acts done to influence or bring about the baleful result is the test. In other words, having regard to the powers 2487
conferred, to the protection of society, to the honest and fair administration of justice and to the evil to come from its obstruction, the wrong depends upon the tendency of the acts to accomplish this result without reference to the consideration of how far they may have been without influence in a particular case. The wrongdoer may not be heard to try the power of the judge to resist acts of obstruction and wrongdoing by him committed as a prelude to trial and punishment for his wrongul acts.'"

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Toledo Newspaper Co. vs. *U. S.*, 247 U. S., 402.

It may be well to repeat that ordinarily the court does not concern itself with attacks of a personal nature nor should it interfere with the fullest exercise of the right to criticize freely. Whether such criticism be just or unjust, the court cannot descend to controversy. It can only hope that, in the light of facts and actual happenings, its conduct may be understood in due time.

2489 A charge, however, either that the court has denied to public officials "any access to original sources of information" in respect of properties being administered by the court or that it has adopted and practised a policy of denying such access, is one of the gravest charges which can be made against a court. One of the great developments in the administration of justice in Anglo-Saxon jurisprudence was that justice should be administered in the open.

So firmly is it established in the administration of justice in American courts that records shall not be secret, that a charge of this character can only have the effect of creating distrust in the minds of those who are not informed. There are few men who do not desire the good will and the confidence of the community in which they live and this is a human desire entertained as much by judges as by others. They realize that while errors of judgment are usually treated with tolerance, deliberate denial of the opportunity of ascertaining the facts in respect of matters affecting the public welfare will not and should not be tolerated.

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When, therefore, such a charge is made one of its subtle purposes is to subject a court to public

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condemnation and, thereby, to intimidate the judge into adopting a course, contrary to what he may deem proper and just.

With this understanding of the nature of the case, it remains to examine the principal contentions advanced on behalf of the defendant.

1. *Publication.* It is urged that there was no publication of the letter, as matter of fact and law. There was much testimony taken on this point. After the letter was dictated by defendant on the morning of October 6, 1919, the steno- 2492
grapher who transcribed the notes, read the letter pursuant to defendant's direction, to the Committee on Finance and Budget of the Board of Estimate and Apportionment (composed of all the members of the Board) which was then holding a meeting in the Comptroller's office. It was not marked "private" nor "personal" and was then sent by hand to the Public Service Commissioner who was holding the conference above referred to. All such letters, according to defendant's testimony are filed in the Comptroller's office and open to public inspection. 2493

From the practice in the Department of Finance, defendant knew that such a letter would become public and, obviously, would be published in the newspaper. The record establishes that there was a publication of the letters

(1) by reading it to the Committee on Finance and Budget of the Board of Estimate and Apportionment;

(2) by sending it to the Public Service Com missioner;

(3) by the publication in the daily press.

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2. *Denial of Access.*

Prior to September 1, 1919, experts had been engaged by the Receivers pursuant to the Court's directions to report, among other things, on the financial position of the corporations and properties then being administered by the Court through its receivers. The experts submitted their preliminary report or summary under date of September 4, 1919.

Upon the submission of such report, the Court
2495 filed a memorandum dated September 6, 1919, calling attention to the report and the serious financial conditions therein set forth, and, among other things, instructing the Receivers as follows:

> "In order that the gravity of the situation may be generaly made known and that some appropriate action may be taken as speedily as is consistent with full information, the Receivers are instructed to send a copy of the summary of Messrs. Stone & Webster and of this memorandum to the State and Municipal
> 2496 authorities, and to civic and taxpayers' associations of the Greater City. *At the same time, the Receivers will make it clear that every facility will be afforded, both to public officials and citizens' associations to satisfy themselves in respect of the actual financial and other conditions existing in relation to the corporations now in their official charge.*"

On September 8, 1919, a copy of this memorandum and of the report of the experts was mailed to defendant. Defendant had read this memorandum of the Court prior to October 6, 1919. (Sten. Min., 732, *et seq.*)

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Defendant, however, never availed himself of the opportunity thus urgently extended to examine and investigate. The undisputed testimony shows that neither the defendant nor any official or representative of the Municipal government ever applied directly or indirectly to Receiver Garrison, Receiver Hedges or Trustee Sheffield to have access to any papers, documents or information of any kind or description whether they were "original sources of information" or otherwise; and that the policy of the Court as carried out by its officers was to invite access to any information in their possession or under their control. 2498

The testimony of the defendant himself was to the same effect, viz., that access had never been denied to him and that he never had made any application of any kind or description for access to "original sources of information" or any information whatever.

3. The statement that the Court made orders, which precluded any application being made by the authorities of the City of New York to any other Court or Judge for any right of examination into the affairs or conditions of the said public utility corporations, was shown by the testimony to have no foundation in fact. No such orders were made. 2499

4. The statement that the Court made orders denying to the authorities of the City of New York the opportunity to ascertain the truth, was shown by the testimony to have no foundation in fact. No such orders were made.

5. The statement that an order of the Court stood "between the public and the truth" was

2500 shown by the testimony to have no foundation in fact. No such order was made.

6. *Intent.* Defendant Craig insists that he did not intend to commit any contemptuous act nor to charge any wrongful conduct against the Court. In answer to questions from his counsel he testified as follows:

> "Q. Now, in writing this letter, did you have any intention whatever of a contemptuous act
2501 towards Judge Mayer?
> A. Certainly not. * * *
> Q. Now I will put the question in this way: In writing this letter, did you have any intention to commit any contemptuous act towards the Court?
> A. I did not.
> Q. Did you have any intention to charge any misconduct, ignominy or wrongful conduct of any kind or character towards Judge Mayer, or towards the Court?
> A. No" (Sten. Min., page 718).

2502 It appears that defendant introduced a resolution in the Board of Estimate and Apportionment in January, 1919, authorizing an application to the Court that he, as Comptroller of the City of New York, should be appointed a co-receiver of the so-called B. R. T. Rapid Transit Companies. The resolution was adopted. This application was made to the Court on January 15, 1919, and was denied. (See opinion of Court, Printed Volume I, Proceedings B. R. T. Receivership, page 233 *et seq.*)

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Defendant testified as to his state of mind induced by the denial of the application to appoint him a co-receiver; but he did not attempt to give to the language of his letter other than its plain and unmistakeable meaning.

His mental attitude was thus stated by him:

"It was my view on the 6th of October, as it had been in the preceding February, that it was only that kind of access (i. e., that which would flow from his appointment as co-receiver) to original sources and access with 2504
power under the control of the Court to require any subordinate, however recalcitrant, or unwilling he might be, to produce whatever there was in the way of information, so that with that in view, and desiring to get Nixon where, if he could accomplish something, he could put the municipal authorities on the same footing as the attorneys for the traction companies, I wrote this letter of October 6th to him, using language that I thought would get into the mind of Nixon, the necessity for that kind of cooperation * * * (Sten Min., 2505
page 633).

The Court: If I understand correctly, it was not intended to convey the meaning that at any time the Judge referred to have in point of fact denied access to any—particularly papers, documents or sources of information, except in connection with what you regarded as the results flowing from the refusal to appoint yourself in your representative capacity as receiver?

The Witness: That is correct * * *"
(Sten. Min., page 715).

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In addition to the foregoing testimony, numerous questions were asked and answered with regard to other parts of the letter and the testimony was in general to the same effect as quoted, *supra.*

From the testimony, it will be found that defendant himself testified:

a. That the court never denied him access to any information;

b. That the statement by defendant as to the "policy" of "denying access" was not intended to refer to any actual occurrences but to the result

2507 which, from defendant's point of view, flowed from the refusal to appoint him co-receiver.

It is a fundamental principle that men are held responsible for the natural consequences of their acts. The unexpressed state of mind of defendant may explain what moved him to write as he did but cannot change the plain meaning nor the effect of what he wrote. The plain meaning of defendant's language was to charge the court with conduct incompatible with the due administration of justice—which charges were false—and the effect was "to obstruct the administration of justice."

2508 *Toledo Newspaper Co.* vs. *U. S., supra.*

It is, therefore, found, that in respect of the matters set forth in the Paragraphs numbered 1, 2, 3 and 4 of the information, the defendant is guilty of contempt of court under Section 268 of the Judicial Code.

The United States Attorney is directed to submit to the court, on two days' notice to counsel for defendant, a proposed order in accordance herewith which shall also provide that the defendant shall appear before the court in Court Room 331, of the Old Post Office Building on February

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24, 1921 at 2 P. M., at which time such further proceedings will be had as may be proper.

The defendant is not only the incumbent of a high office, but is also a member of the bar of this court. It is manifestly his duty to do all in his power to repair the wrong he has done.

It is not a wrong with which the judge concerns himself in a personal sense and for that reason no personal apology is desired nor required. The wrong has been perpetrated against the administration of justice.

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The reparation which is within the power of the defendant is promptly to make and file in the office of the Clerk of the Court an unqualified retraction of the false statements respecting the court, referred to in Paragraphs 1, 2, 3 and 4 of the information.

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2512 **Exhibit G to Petition for Writ—Order.**

At a Stated Term of the United States District Court held in and for the Southern District of New York in the United States Courts and Post Office Building in the Borough of Manhattan, City, County and State of New York, on the 24th day of February, 1921.

Present—Honorable JULIUS M. MAYER, United
2513 States District Judge.

UNITED STATES OF AMERICA,
Plaintiff,

against

CHARLES L. CRAIG,
Defendant.

2514 The issues joined herein upon the information and the defendant's plea of not guilty having duly come on for trial, and the evidence adduced by the parties having been received and the argument of counsel for the United States and for the defendant heard,

NOW, after due deliberation thereon, it is

CONSIDERED, ORDERED AND ADJUDGED that the defendant Charles L. Craig

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is, and hereby is found and declared, guilty of contempt of this Court as charged in the information, in respect of the matters set forth in paragraphs numbered 1, 2, 3 and 4 of the information herein; and it is

FURTHER CONSIDERED, ORDERED AND ADJUDGED that the said defendant appear before this Court, at the United States Courts and Post Office Building, Borough of Manhattan, New York City, in Courtroom 331 thereof, on February 24, 1921, at two o'clock in the afternoon of that day, for such further proceedings herein as may be proper.

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(sgd) JULIUS M. MAYER,
United States District Judge.

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2518 **Exhibit H to Petition for Writ—Summary of Testimony on the Contempt Trial.**

This Exhibit was a summary of the testimony on the Contempt Trial. The transcript of the testimony and proceedings is among the Exhibits received in evidence on the trial on Habeas Corpus, *supra,* pages 89 to 820; and therefore this Exhibit is not printed here to avoid repetition.

2519 The papers referred to in Paragraph 18 of the Petition for Writ of Habeas Corpus are the exhibits on the trial of the Contempt Proceeding, received in evidence on the trial in Habeas Corpus, and are not printed here to avoid repetition.

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Return to Writ of Habeas Corpus. 2521

Before—Honorable MARTIN T. MANTON, Circuit Judge of the United States.

In the Matter
of
CHARLES L. CRAIG,
Petitioner.

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To the Honorable Martin T. Manton,
Circuit Judge of the United States:

1. Comes now Thomas D. McCarthy, United States Marshal for the Southern District of New York, and for his return to the writ of habeas corpus issued herein certifies and states, in conformity with the provisions of Section 757 of the Revised Statutes of the United States, as follows, to wit:

II. It is respectfully urged that your Honor is and was without jurisdiction or authority to issue 2523
any writ of habeas corpus to the petitioner herein, because no provision of the laws of the United States vests authority to issue writs of habeas corpus in any Circuit Judge or in any Judge of the United States Circuit Court of Appeals.

III. It is respectfully urged that on its face the petition upon which the writ of habeas corpus herein was granted is insufficient in law, that the petitioner is not entitled thereto and that the writ should therefore be quashed, for the following reasons:

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(a) The petition for the said writ does not allege facts sufficient to show that the proceedings upon which the petitioner was committed and under which he came into the custody of this respondent were not regular or were not in compliance with the statutes of the United States applicable thereto.

(b) The petition does not allege facts sufficient to show that the Court which sentenced and committed the petitioner did not have jurisdiction of
2525 him or that it did not have jurisdiction of the subject matter of the proceedings upon which the said commitment was based.

(c) The petition shows on its face that the District Court of the United States for the Southern District of New York, in proceedings therein pursuant to Section 268 of the Judicial Code, in which it had and exercised jurisdiction of the person of the petitioner, has duly and regularly convicted the petitioner of contempt of Court and duly and regularly sentenced him therefor to the term of im-
2526 prisonment specified in the commitment under which this respondent took him into custody as alleged in the petition; and no Court or Judge has jurisdiction or authority by habeas corpus to set aside or nullify such conviction or sentence.

IV. Still insisting that your Honor is without authority to issue a writ of habeas corpus and that the petition for the writ herein is insufficient in law, and without waiver thereof, this respondent says: On October 6, 1919, there was not pending awaiting decision any order or judicial de-

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termination mentioned in the letter of that date from the petitioner to Lewis Nixon, set forth in the information, but the same was still within the control of the District Court of the United States for the Southern District of New York and subject to change. The allegations of sub-division k of paragraph 17 of the petition are true, except that it is a fact that the petitioner on and prior to the date mentioned therein was and ever since has been a member of the bar of said Court, duly admitted to practice therein. The information and the order of November 20, 1919, of which copies 2528
are annexed as parts of Exhibit A to the petition, speak for themselves, reference is hereby made thereto, and this respondent denies the legal effect sought to be attributed to such information and order by sub-divisions r and s of paragraph 17 of the petition. Except as in this paragraph of this return expressly admitted, this respondent denies each and every allegation contained in paragraphs 2, 17 and 19 of the said petition.

V. On March 15, 1920, the petitioner moved the Court to designate a Judge other than a Judge 2529
of the Southern District of New York to hear the contempt proceedings against the petitioner, or if such a Judge were not available that the Court designate a Judge of the Southern District of New York other than the Judge before whom or as to whom the alleged contempt was said to have been committed. The motion was overruled and the petitioner excepted thereto. Other than as in this paragraph of this return expressly admitted, this respondent denies each and every allegation contained in paragraph 11 of the petition. Further

2530 answering the petition, this respondent alleges that at no time during the pendency of the contempt proceedings in the District Court of the United States for the Southern District of New York was any affidavit filed under or any step taken in accordance with Section 21 of the Judicial Code by or on behalf of the petitioner.

VI. Exhibit H to the petition, referred to in paragraph 18 thereof, is not a transcript of the testimony of the petitioner; but consists of extracts
2531 containing parts of the testimony of the petitioner given upon his trial in the District Court of the United States for the Southern District of New York on the charge of contempt of Court, arranged in argumentative form, with sub-headings inserted therein taken from a brief of counsel for petitioner submitted to said Court.

VII. Further answering the petition, this respondent shows that: On December 2, 1919, the petitioner failed to appear in person in the District Court of the United States as required by the order
2532 to show cause of November 26, 1919, of which a copy is contained in Exhibit A to the petition. Thereupon, the United States Attorney, on December 2, 1919, moved the Court to issue a warrant of attachment for the arrest and production of the petitioner in person before said Court to answer the information. The Court reserved decision on that motion and on December 23, 1919, made and filed a memorandum in said contempt proceedings in which it was stated that if the petitioner (defendant) entertained the view that his appearance in person might waive his challenge of the jurisdiction of the Court, then the Court would grant the

motion of the United States Attorney for the issuance of such attachment. In said memorandum it was further stated that, in order to allow the defendant full opportunity to determine what course he would pursue, the Court set down December 29, 1919, for the appearance of the defendant and would not issue the attachment unless at that time the defendant had failed to appear. On December 29, 1919, the petitioner (defendant) by his attorney entered a general appearance in said proceedings and, after discussion between counsel for the petitioner and for the United States and the Court, the Court set down the cause for hearing on January 7, 1920, and announced that unless the petitioner appeared at the latter time in person in Court, a body attachment would forthwith issue for him. On January 7, 1920, by stipulation, the matter was adjourned, without prejudice to either party, until January 17, 1920. On January 17, 1920, the petitioner appeared in person in said Court, was duly and regularly arraigned in open Court upon said information, and was paroled in the custody of his counsel. Thereafter, a demurrer of the petitioner to the information having meanwhile been overruled, on the 15th day of March, 1920, the petitioner was duly and regularly arraigned in said Court and in open Court pleaded not guilty to the information, a copy of which is annexed to the petition as a part of Exhibit A thereto; that thereafter he was duly and regularly tried and convicted by said Court of the offense charged in said information; and that on the 24th day of February, 1921, after his said conviction, he was in open Court sentenced by said Court, as a punishment for the contempt of which he had been

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so found guilty, to serve a term of sixty days in the Essex County Jail at Newark, New Jersey.

VIII. In accordance with and pursuant to the provisions of Section 5546 of the Revised Statutes of the United States, as amended by the Act of March 3, 1901 (31 Stat., 1450), the Attorney General of the United States, by a letter addressed to the United States Attorney for the Southern District of New York, dated May 7, 1919, and the District Court of the United States for the Southern
2537 District of New York, by an order dated May 13, 1919, designated the said Essex County Jail as the place of confinement for defendants sentenced in the Southern District of New York for terms of imprisonment for less than six months, copies of which letter and order are hereto annexed marked Exhibit I, and such designations are and ever since the respective dates thereof have been in full force and affect. This respondent's custody of the petitioner complained of in the petition was by virtue of and in obedience to, and the true cause of the detention of the petitioner was, a commit-
2538 ment duly and regularly issued out of the said Court requiring this respondent to take the petitioner into custody for the purpose of imprisoning him in the said Essex County Jail in execution of said sentence, a copy of which is hereto annexed as Exhibit II.

IX. Further answering the petition this respondent alleges that all the issues raised thereby with respect to the said proceedings in the District Court of the United States for the Southern District of New York to punish the petitioner for contempt of Court, or with respect to the validity or

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lawfulness of such proceedings, were raised by the petitioner in the course thereof, evidence was received thereon, he was duly heard thereon, the same were thereupon each duly determined by said Court adversely to the petitioner, its adjudication that the petitioner was guilty of the contempt charged in the information has never been reviewed or reversed by any appellate Court, and such adjudication remains in full force and effect.

X. This respondent has produced before your Honor the body of the petitioner as commanded by 2540
the writ of habeas corpus herein, and prays that the said writ be dismissed and that the petitioner be remanded to this respondent's custody to be dealt with in accordance with the said commitment.

Dated March 3, 1921.

Respectfully submitted,

THOMAS D. McCARTHY,
United States Marshal for the
Southern District of New York, Respondent.

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FRANCIS G. CAFFEY,
United States Attorney for the
Southern District of New York.

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State of New York,
County of New York,
Southern District of New York, } ss.:

Thomas D. McCarthy, being duly sworn, deposes and says that he is United States Marshal for the Southern District of New York and as such is the respondent herein; that he has read the foregoing return and knows the contents thereof, and that the same is true to the best of his information and belief.

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THOMAS D. McCARTHY.

Sworn to before me this
3rd day of March, 1921.

ARTHUR P. LAVERY,
New York County 392.
(Seal) Notary Public,

Filed, with Exhibits I & II attached, April 29, 1921.

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Exhibit I.

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK.

In the Matter

of

The designation of the Essex County Jail, Newark, N. J., as the place of confinement for defendants sentenced in this District for terms of imprisonment for less than six months, and the Essex County Penitentiary, Cladwell, N. J., as the place of confinement for defendants sentenced in this District for terms of imprisonment ranging from six months to one year, inclusive.

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Upon reading and filing the annexed letter from the Attorney General of the United States, dated May 9, 1919, to Francis G. Caffey, United States Attorney, New York, N. Y., it is hereby

ORDERED that the Essex County Jail, Newark, N. J., is now designated as the place of confinement for defendants sentenced in this District for terms of imprisonment for less than six months, and that the Essex County Penitentiary, Caldwell, N. J., is designated as the place of confinement for defendants sentenced in this District for terms of imprisonment ranging from six months to one year, inclusive.

Dated, New York, N. Y., May 13, 1919.

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DEPARTMENT OF JUSTICE,

WASHINGTON, D. C.

FHD McG-MDB

May 7, 1919.

Mr. Francis G. Caffey,
U. S. Attorney,
New York, New York.

2549 Sir:

The designation contained in letter dated February 28, 1918, addressed to your office, of the Essex County Jail, Newark, New Jersey, as the place of confinement for defendants sentenced in your district for terms of not more than one year, is hereby amended to the extent that the Essex County Jail is designated for defendants who are sentenced to imprisonment for less than six months, and the Essex County Penitentiary, Caldwell, New Jersey, is now designated as the place of confinement for those sentenced for terms ranging from six months

2550 to one year, inclusive.

This change is made in the interest of the long-term prisoners, in view of the fact that the Essex County Jail is not equipped properly to handle prisoners sentenced for six months or over, and the authorities of that jail have requested that no more prisoners be sent them whose terms are for six months or more.

Please present this matter to the Court, and request that these new designations be observed in future sentences, and also that prisoners now held in local institutions under sentence be committed in accordance with this designation.

Respectfully, for the Attorney General,

WM. J. ERIERSON

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Exhibit II.

At a Stated Term of the District Court of the United States of America, for the Southern District of New York, in the Second Circuit, held at the United States Court House, in the Borough of Manhattan, City of New York, on the 24th day of February, in the year of our Lord one thousand nine hundred and twenty-one.

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Present—The Honorable JULIUS M. MAYER, Judge.

THE UNITED STATES vs. CHARLES L. CRAIG.	20/121. U. S. Judicial Code, §268. Contempt.

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On motion of the United States Attorney, Ordered sentence.

The Court thereupon proceeds to pass judgment, and sentence the prisoner Charles L. Craig to be imprisoned for a term of sixty days.

Sentence to be executed at the Essex County Jail, Newark, N. J.

An extract from the minutes.

ALEX GILCHRIST, JR.,
Clerk.

A true copy
ALEX GILCHRIST, JR.,
Clerk.

2554 **Traverse to Return to Writ of Habeas Corpus.**

Before—Honorable MARTIN T. MANTON, Circuit Judge of the United States.

In the Matter
of
CHARLES L. CRAIG,
Petitioner.

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To the Honorable Martin T. Manton, Circuit Judge of the United States:

I. Comes now Charles L. Craig, and for denial and traverse to the return of Thomas D. McCarthy, United States Marshal for the Southern District of New York, to the writ of habeas corpus issued herein, in conformity with the provisions of Section 760 of the Revised Statutes of the United States.

2556 II. The petitioner traverses and denies the subject matter set forth in paragraph 2 of the return wherein it is respectfully urged by the respondent that your Honor is and was without jurisdiction or authority to issue any writ of habeas corpus to the petitioner herein; and further traverses and denies that no provision of the laws of the United States vests authority to issue writs of habeas corpus in any Circuit Judge and to the contrary of such contention, your petitioner alleges:

That your Honor had authority at the time that the said writ was issued and now has jurisdiction

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and authority to issue a writ of habeas corpus to the petitioner herein, because the laws of the United States vest authority to issue writs of habeas corpus in a Circuit Judge within his territorial jurisdiction, and the said writ was issued by your Honor as a Circuit Judge of the Second Circuit, within the territorial jurisdiction of the said Circuit, to wit, in the Southern District of New York, and that the respondent has waived any question of jurisdiction by filing his return without having first moved to quash said writ.

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Furthermore, at the time that the said writ was issued, your Honor had been duly designated and appointed on the 18th day of February, 1921, to hold a session of the District Court of the United States for the Southern District of New York, for the trial of causes and the hearing and disposition of such exparte and other business as might come before you during the period beginning February 21, 1921, and ending on March 5, 1921, and that as appears by the designation filed in the office of the Clerk of the District Court on the 18th day of February, 1921, which is hereby made a part hereof, and a copy of which is hereto annexed marked

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Exhibit A, from the said 21st day of February, 1921, up to and including the time of the issuance of the said writ, your Honor was actually attending to all exparte business of the District Court including the issuance of writs of habeas corpus in the place of the District Court Judge ordinarily assigned to dispose of such exparte matters and that, at the time the said writ was applied for, no District Judge was hearing, attending to, or disposing of, any of said exparte matters.

Your petitioner still further avers and alleges that any question of your Honor's jurisdiction or

2560 authority to issue the said writ of habeas corpus in your capacity as Circuit Judge of the Second Circuit, is a moot question, in view of the fact that you had been designated and at the same time and place you were actually acting in the place of the District Judge ordinarily assigned for the transaction of such matters.

III. The petitioner denies that, on the face of the petition on which the writ of habeas corpus herein was granted, it is insufficient in law, and
2561 denies that the petitioner is not entitled thereto, and denies that the writ should, therefore, be quashed; and, on the contrary, alleges that on the face of the petition it appears that the same is sufficient in law and that the petitioner was entitled to said writ and that the writ should not be quashed.

(a) The petitioner denies that the petition for the said writ does not allege facts sufficient to show the proceedings upon which the petitioner was committed, and under which he came into the custody
2562 of the respondent, were not regular or were not in compliance with the Statutes of the United States applicable thereto; and on the contrary, the petitioner alleges that the said writ does allege facts sufficient to show that the proceedings upon which the petitioner was committed and under which he came into the custody of this respondent were not regular and were not in compliance with the Statutes of the United States applicable thereto.

(b) The petitioner denies that the petition does not allege facts sufficient to show that the Court

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which sentenced and committed the petitioner did not have jurisdiction of him or that it did not have jurisdiction of the subject matter of the proceedings upon which the said commitment was based; and on the contrary, the petitioner alleges that the petition does allege facts sufficient to show that the Court which sentenced and committed the petitioner did not have jurisdiction of him, and that it did not have jurisdiction of the subject matter of the proceedings upon which the said commitment was based.

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(c) The petitioner denies that the petition shows on its face that the District Court of the United States for the Southern District of New York, in proceedings therein pursuant to Section 268 of the Judicial Code had and exercised jurisdiction of the person of the petitioner. The petitioner denies that the petition shows on its face that the District Court of the United States for the Southern District of New York in proceedings therein pursuant to Section 268 of the Judicial Code has duly and regularly convicted the petitioner of contempt of Court. The petitioner denies that the petition 2565
shows on its face that the District Court of the United States for the Southern District of New York, in proceedings therein pursuant to Section 268 of the Judicial Code, has duly or regularly sentenced him for contempt of Court to the term of imprisonment specified in the commitment under which this respondent took him into custody.

On the contrary, the petitioner avers and alleges that the petition shows on its face that the District Court of the United States for the Southern District of New York, in proceedings therein

2566 alleged to be pursuant to Section 268 of the Judicial Code, did not have or exercise jurisdiction of the person of the petitioner, but petitioner admits that it attempted so to do. The petitioner avers and alleges that the petition shows on its face that he was not duly or regularly convicted of contempt of Court. The petitioner further avers and alleges that the petition shows on its face that he was not duly or regularly sentenced to the term of imprisonment specified in the commitment under which the respondent took him into custody.

2567 IV. The petitioner denies that no Court or Judge has jurisdiction or authority by habeas corpus to set aside or nullify such conviction or sentence; and the petitioner alleges in that respect that the Judge by whom said writ was issued has jurisdiction and authority by habeas corpus to relieve your petitioner of unlawful imprisonment contrary to the Constitution and Laws of the United States, and, if need be, to set aside and nullify such conviction or sentence to that extent, and to disregard it as without and beyond the jurisdiction and in ex-
2568 cess of the powers of the Court.

V. The petitioner denies that on October 6, 1919, there was any order or judicial determination mentioned in the letter of that date from the petitioner to Lewis Nixon, set forth in the information, still within the control of the District Court of the United States, for the Southern District of New York, or subject to change; and on the contrary, the petitioner avers and alleges that on October 6, 1919, there was no order or judicial determination mentioned in the Information still within the control of the District Court of the United States, for

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the Southern District of New York, or subject to change, except and unless the Court were regularly moved in due course to change the same or to exercise control thereof; and no such application had been made or was then pending.

VI. That this petitioner reavers and realleges each and every averment and allegation contained in Paragraphs 2, 17 and 19 of the said petition, in addition to those expressly admitted in Paragraph IV of the return.

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VII. The petitioner admits that Exhibit H annexed to the petition, which exhibit is referred to in Paragraph 18 thereof, is not a literal transcript of the testimony of the petitioner, but is a transcript of the substance and of the whole thereof with the exception of formal matters, and was annexed to the petition for convenient reference, the portions thereof indicated by quotation marks being literally transcribed from the transcript of the stenographer's minutes.

The subheadings inserted therein by counsel are all plainly indicated therein by italics and contain no argumentative matter. The headings consist solely of a condensation of the petitioner's own phrases as used in his testimony. In addition to the transcript of the testimony of petitioner, contained in Exhibit H, there was presented and submitted to, and left with your Honor at the time that the said writ was applied for, granted and allowed, the original literal transcript of the testimony of the petitioner taken stenographically and all other testimony taken in the proceeding, consisting of three volumes of typewritten matter. The original transcript thus submitted and the ex

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2572 hibits are described in the petition in the following words:

> "All of the evidence in the case is herewith submitted."

VIII. Your petitioner admits that on December 2, 1919, the petitioner did not appear in person in the District Court of the United States, but denies that he failed so to do; he denies that he was required by the order to show cause of November
2573 20, 1919, of which a copy is contained in Exhibit A annexed to the petition, to appear as therein provided, but he admits that the said order assumed to require him to so appear.

On the 2nd day of December, 1919, your petitioner did not appear in person. He appeared by counsel specially, but not generally, to object to the jurisdiction of his person, jurisdictionally to the sufficiency, validity, substance and subject matter of the order to show cause dated November 20, 1919, and the information annexed thereto. Thereupon, the United States Attorney asked the Court
2574 to issue a warrant of attachment for petitioner's arrest and production in person before the Court to answer the said information. The Court reserved decision upon both matters and set down the questions raised by said special appearance of the petitioner and by the motion of the United States Attorney, for argument on December 10, 1919. On the 10th day of December, 1919, such argument was had and on December 23, a memorandum in said proceedings was made by the Court and filed in which it was stated that if the petitioner (defendant) entertained the view that his appearance in person might waive his challenge of

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the jurisdiction of the Court then the Court would grant the motion of the United States Attorney for the issuance of an attachment. In said memorandum it was further stated that in order to allow the defendant full opportunity to determine what course he would pursue, the Court set down December 29, 1919, for the appearance of defendant and would issue the attachment unless at that time the defendant had failed to appear.

On December 29, 1919, the petitioner (defendant) by his counsel, but not in person, appeared and excepted to the said decision, and having so 2576
excepted, appeared generally by counsel, the Court ruling thereupon that the petitioner (defendant) had saved his rights by the exception.

That after discussion, the Court announced on that day as follows:

That on January 7, 1920, at 2 o'clock, he would issue a body attachment forthwith unless at that time the defendant appeared in the Court Room pursuant to the Court's suggestion. On January 7, 1920, by stipulation between counsel the matter was adjourned without prejudice to either party until January 17, 1920.

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On January 17, 1920, the petitioner appeared in person with his counsel before the Court, stating that in view of the ruling above mentioned, the defendant being powerless to resist the process of the Court, reserving his objection and his exception, appeared in person and was then present in Court. Whereupon the defendant was called upon by the Court to plead. Before pleading, the petitioner (defendant) interposed a motion to quash, a copy of which is annexed to the petition marked Exhibit C.

2578 IX. The petitioner denies that he was paroled in the custody of his counsel. The District Attorney suggested that the defendant be released upon his own recognizance or in the custody of his own counsel, whereupon the Court said in the first instance that he was released on his own recognizance but upon your petitioner's counsel asserting that such was entirely outside of any procedure that was known in a contempt proceeding, the Court ruled that it would disregard the point to which the District Attorney referred and that he would
2579 consider the question of recognizance practically wiped from the record.

That subsequently the petitioner's (defendant's) motion to quash was overruled. That a demurrer was interposed, copy of which is annexed to the petition marked Exhibit D, and after argument, the demurrer was overruled. The defendant (petitioner) excepted to the decision overruling the demurrer. Petitioner then moved for a trial by jury on the ground that the alleged contempt is not of the kind, character or nature which by the terms of the Act is triable by the Court as a summary proceeding,
2580 but on the contrary, is of that kind, character and nature which under the Statute is triable by a jury. This motion was denied, to which the defendant (petitioner) excepted. Defendant (petitioner) then moved that the Court designate a Judge other than a Judge of the District Court to hear the proceeding. This motion was denied, to which the defendant (petitioner) excepted.

That on the 15th day of March, 1920, the defendant (petitioner) filed a plea of Not Guilty (a copy of which is annexed to the petition and part of Exhibit A thereto). Then both of the motions were

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restated and denied and an exception again taken by the defendant.

X. That except as hereinbefore expressly admitted, the defendant denies each and every allegation contained in so much of paragraph 7 as is hereinbefore referred to.

XI. That the petitioner denies that he was duly or regularly tried and avers and alleges that he was not duly or regularly tried; but that on the contrary, the Court had no jurisdiction to try him and 2582
exceed its powers in so doing. The petitioner denies that he was convicted by said Court of the offense charged in said information, but admits that the Court assumed to convict him and avers and alleges that his alleged conviction was beyond the jurisdiction of the Court and in excess of its powers and in violation of the laws of the United States.

XII. The petitioner denies that he was sentenced by said Court, but admits that the Court assumed to pronounce sentence and avers and alleges that the alleged sentence was without jurisdiction and 2583
in excess of the powers of the said Court. The petitioner denies that he was sentenced by the said Court as a punishment for the contempt of which he had been found guilty, as alleged in the Return, but admits that the Court assumed to find him guilty, and alleges and avers that no contempt had been or has been committed by him and that the act which is alleged in the Return as a contempt was not within the jurisdiction of the Court and the alleged finding of the Court as set forth in said Return that he was guilty was in excess of the

2584 powers of the Court, and in violation of the laws of the United States.

XIII. The petitioner denies that the respondent's custody of the petitioner, complained of in the petition, was by virtue of or in obedience to a commitment duly or regularly issued out of said Court, and denies that the true cause of the detention of the petitioner was a commitment duly or regularly issued, and the petitioner alleges and avers that the said commitment was not duly or regularly issued
2585 out of the said Court, but was issued or attempted to be issued without jurisdiction and in excess of the powers of the Court and in violation of the laws of the United States.

The petitioner alleges that the Court pronounced orally on the said 24th day of February, 1921, in the presence of the petitioner and of his counsel and the United States Attorney and respondent that the defendant (petitioner) be confined in the Essex County Jail in Newark, New Jersey, for sixty days; whereupon the respondent was directed to take the defendant into custody and the respondent did so
2586 accordingly and while so detained in the respondent's custody, the petitioner caused the writ of habeas corpus hereinbefore referred to, to be applied for and it was allowed and issued by your Honor and forthwith served upon the respondent in person, who forthwith produced the petitioner before your Honor.

XIV. Petitioner denies that all the issues raised with respect to the said proceedings in the District Court of the United States for the Southern District of New York, to punish the petitioner for contempt of court were raised by the petitioner in the

course of said proceedings, but petitioner admits, avers and alleges that he attempted to raise the same in the course thereof. Petitioner denies that all the issues raised with respect to the validity and lawfulness of such proceedings, were raised by the petitioner in the course thereof, but the petitioner admits, avers and alleges that he attempted so to do. The petitioner denies that evidence was received on the issues raised by his petition herein and alleges and avers that there was no legal or competent evidence received before the Court of the facts or acts attempted to be adjudicated by said Court. That the petitioner admits, however, that witnesses were examined. 2587 2588

XV. Petitioner denies that the issues raised by the petition herein were duly determined by said Court or were duly determined adversely to the petitioner, and avers and alleges that no issue was duly determined by said Court adversely to the petitioner and that the alleged determination was without any legal or competent evidence of the facts or acts and was without and beyond the jurisdiction of the Court and in excess of its powers and was in violation of the laws of the United States. The petitioner denies that the alleged adjudication set forth in the Return remains in full force and effect, and the petitioner avers and alleges that such alleged adjudication does not remain in full force or effect and that there was no legal or competent evidence in support of the said alleged adjudication and that the said alleged adjudication was without and beyond the jurisdiction of the Court, in excess of its powers, in violation of the laws of the United States, and is null, void and of no force or effect. 2589

2590 XVI. That at the time of the making and filing of the Information set forth in your petitioner's petition for a writ of habeas corpus and for a long time prior thereto, there was a law of the United States generally known and designated as Section 268 of the Judicial Code, reading substantially as follows:

> "Said Courts (meaning the Courts of the United States) shall have power to impose and administer all necessary oaths, and to
2591 punish by fine or imprisonment, at the discretion of the Court, contempts of their authority; provided that such power to punish contempt shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said Courts, in their official transactions and the disobedience or resistance of any such officer, or by any party, juror, witness or other person to any lawful writ, process, order, rule,
2592 decree, or command of the said Courts."

That the petitioner had not committed nor been guilty of any misbehavior in the presence of said Court, or so near thereto as to obstruct the administration of justice nor of disobedience or resistance to any lawful writ, process, order, rule, decree or command of the said Court at any time prior to the making or filing of the said Information; that the said Information did not set forth or allege that your petitioner had committed or been guilty of any such act; that the alleged misbehavior with which your petitioner was charged

and for which he was committed was not such as under the provisions of the said law made him liable to fine or imprisonment. That in fact, no contempt had been committed, and the said Information did not show that any contempt had been committed; that there was no legal or competent evidence before the said Court that your petitioner had committed or been guilty of any such act; that the alleged order and adjudication did not establish that any contempt had been committed; that the alleged or purported order, adjudication, sentence and commitment and each of them set forth in the petition and in the return was without jurisdiction and in excess of power and that the same were and each of them was in violation of the laws of the United States, to wit, the law above referred to, among others.

That the alleged contempt with which your petitioner was charged consisted solely and wholly of the writing of a letter which was and is set out in the Information, which letter, upon its face, shows that it was not contemptuous in form or substance; that the said letter was written by your petitioner in his official capacity as Comptroller of the City of New York and as a member of the Board of Estimate and Apportionment of said City to the Public Service Commissioner for the First Judicial District in the State of New York, in the discharge or attempted discharge of an official duty, and as such was a privileged communication.

That there are exceptional conditions and circumstances that warrant and justify the resort to a writ of habeas corpus in this proceeding rather than, or in preference to, a review of the proceedings of the District Court by some other procedure,

2596 method or means, if any such there be. That such exceptional conditions and circumstances are that the petitioner is the duly elected Comptroller of the City of New York and as such, a member of the Board of Estimate and Apportionment, which facts are set forth in the petition for the writ, and as such, has the daily and constant care and management of the finances of the City of New York, and the consideration of vast projects of the City before the Board of Estimate and Apportionment, which meets weekly and sometimes oftener and in
2597 which said Board of Estimate and Apportionment there are a number of subjects that cannot be passed upon by law without the vote of your petitioner; that your petitioner's presence at meetings of the Sinking Fund Commission, which meets every two weeks is expressly required by law to constitute a quorum; that there are frequent meetings of boards and bodies and a large number of committee meetings, all of which require the constant time and attention of your petitioner in one or the other of said capacities of your petitioner.

2598 That at the present time and for a period since long prior to the writing of the letter set out in the Information, the question of the interests of the City, financially and otherwise, in matters relating to rapid transit, have been uppermost in the minds of the people of the community and of daily comment in the Press. That the direct financial interests of the City in such matters are vast, in amount running into hundreds of millions of dollars. That all of the people and all of the parties insist that the rapid transit problems ought to have been settled or ought to be settled by the Board of Estimate and Apportion-

ment, or that new laws should be enacted for the settlement of such questions by new means. 2599

There is now pending before the Legislature of the State of New York, bills aimed at the practical elimination of the Board of Estimate and Apportionment from the traffic situation. In all of such matters, the petitioner has taken and is taking a daily and active part and is expected by his constituents and by the public at large to take an active part. That there have been and are numerous actions and proceedings in the courts relating to the rapid transit situation. 2600

That it is available and necessary for the petitioner to perform his duties without fear or favor and without being subjected to proceedings for contempt of court, and to know definitely and finally whether such acts as are alleged in this proceeding, are within or beyond the due performance of his duty.

That the term of office of your petitioner expires at the end of the present calendar year, and that your petitioner is informed and believes that if a speedy determination of these matters is not reached by means of a writ of habeas corpus the questions involved cannot be finally determined before the expiration of his term of office. 2601

By way of further denial the said petitoiner alleges that upon its face the return of the respondent shows that petitioner is entitled to a discharge from the unlawful detention in which he is now held by the said respondent and that accordingly he prays as prayed in his petition, that he may be discharged from such detention.

CHARLES L. CRAIG,
Petitioner

2602

State of New York,
County of New York,
Southern District of New York, } ss.:

Charles L. Craig, being duly sworn, deposes and says that he is the petitioner in this proceeding and the person named in the foregoing traverse and denial subscribed by him. That he has read the same and knows the contents thereof and that the said statements made are true as he verily believes.

CHARLES L. CRAIG.

2603 Subscribed and sworn to before me this 11th day of March, 1921.

GEO. T. VAN VALKENBURGH,
Notary Public,
New York Co.

Filed, with Exhibit A attached, April 29, 1921.

Exhibit A.

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK.

2604 In order to meet the requirements of the public interest and under the authority conferred by Section 18 of the Judicial Code as amended, I HEREBY DESIGNATE AND APPOINT United States Circuit Judge MARTIN T. MANTON to hold a session of the District Court of the United States for the Southern District of New York for the trial of causes and the hearing and disposition of such ex parte and other business as may come before him during the period beginning February 21, 1921, and ending March 5, 1921.

Dated, February 18, 1921.

H. G. WARD,
Senior Circuit Judge of the Second Circuit.

Statement of Facts. 2605

Before—Hon. MARTIN T. MANTON,
United States Circuit Judge.

In the Matter of CHARLES L. CRAIG, Petitioner.	Statement of Facts.

2606

BE IT REMEMBERED that on the 24th day of February, 1921, the above entitled matter came on to be heard before the Honorable Martin T. Manton, United States Circuit Judge, in and for the Second Circuit, at which time and on the subsequent dates below mentioned to which adjornment of the above entitled matter was duly taken, the following procedings were had.

February 24, 1921.

APPEARANCES:

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FRANCIS G. CAFFEY, United States Attorney for Thomas D. McCarthy, United States Marshal.

DAVID V. CAHILL, Assistant United States Attorney, of Counsel.

JOHN P. O'BRIEN, Corporation Counsel of the City of New York, for the Petitioner.

EDMUND L. MOONEY, Esq., of Counsel.

The United States Marshal produced the petitioner, Charles L. Craig, as required by the writ forthwith before Judge Manton in his Chambers.

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Mr. Caffey asked for time in which to prepare and file a return. Thereupon the proceedings were adjourned to the 3rd day of March, 1921, the petitioner being paroled in the custody of his counsel.

March 3, 1921.

Same appearances.

Mr. Caffey stated that the return of Thomas D. McCarthy, United States Marshal for the Southern
2609 District of New York to the writ had been prepared but had not yet been certified by the Marshal and it was agreed that an adjournment should be taken until March 12, 1921, at 10 A. M. in order to afford an opportunity for the certification of the return.

The following proceedings were also had:

The Court: Now, before doing that, Mr. Mooney, do you want this presented to me as Circuit Judge, or do you want to submit it to me as Circuit Judge, sitting in the District Court?

Mr. Mooney: I have had to present it to your
2610 Honor as a Circuit Judge but I nevertheless do offer to put in proof in a formal way, or to ask your Honor to take judicial notice of the fact that you were at that time designated as a District Judge. You were a Judge at that time—

The Court: The point that I am going to ask you to decide, if you will—the papers are entitled as a Circuit Judge. I am now sitting as a Circuit Judge in the District Court. I just had the question up in another case, the Lamar case, and I wanted to let you decide for yourself.

Mr. Caffey: It has to do with the question whether after a final decision the party adverse

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to whom the decision is rendered, will be entitled to an appeal, and therefore, Mr. Mooney should take a position one way or the other now.

Mr. Mooney: I am taking it. I never have any doubt as to what position I am going to take. I am going to take my position exactly as it was when I started, and I am going to keep it but I am going to do a little bit more than that. I am going to take such a course with regard to the proofs as will render the point suggested by Colonel Caffey an entirely moot or academic point. I shall insist that we shall proceed in the way that we started, and that we proceed in that way to the end.

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The Court: All right.

Mr. Caffey: Oh, I gave notice to Mr. Mooney at the time the writ was signed that I shall raise the question of the power or authority of the Circuit Judge to issue a writ of habeas corpus.

The Court: We will set the matter down for a week from Saturday at 10 o'clock.

Whereupon an adjournment was taken to Saturday, March 12, 1921, at 10 A. M.

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March 12, 1921.

Same appearances.

The return of Thomas D. McCarthy, United States Marshal, to the writ having been duly filed, a traverse thereto was filed in behalf of the petitioner.

The following occurred:

Mr. Caffey: If your Honor will permit me, I would like to go into this question of jurisdiction at some length.

The Court: All right, Colonel.

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Mr. Mooney: We raise a preliminary point in that respect, your Honor, that by filing a return the District Attorney has waived an objection to the jurisdiction, which should have been by motion to quash. We stated that upon the record, so that we may proceed with what seem to be regular steps.

The Court: I will consider that when the time comes. Now, Mr. Caffey—

Mr. Caffey: I would say, while it is on my mind, in response to what has just been stated in the first

2615 place upon the question of power, there can be no waiver. In the second place, at every stage of the proceedings, commencing with the appearance in your Honor's Chambers on February 24th in the return itself, on the previous hearing held March 3rd, and throughout, I have given notice that I insisted upon this question and, therefore, as a matter of fact there could not have been any waiver. In the third place, even if, as I shall proceed to argue, the document headed "Writ of Habeas Corpus," signed by your Honor, as Circuit Judge on February 24, 1921, had been absolutely void as a

2616 writ of habeas corpus, due respect for your Honor, as a Circuit Judge, as well as perhaps the provision of Section 753, I think it is, of the Revised Statutes, suggested and required that the Marshal immediately respond to the requirements of that order; therefore, there can be no waiver.

Now, I move first to dismiss the proceeding upon the ground that a Circuit Judge of the United States has no jurisdiction or power to grant or issue a writ of habeas corpus, or to discharge on a writ of habeas corpus.

Secondly, I move to vacate and quash the paper of February 24th, 1921, signed by your Honor as Circuit Judge and entitled "Writ of Habeas Cor-

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pus" upon the grounds, that there was no power to grant or issue a writ of habeas corpus vested in a Circuit Judge of the United States;

Thirdly, I move to vacate and quash the said paper upon the ground that it was improvidently signed;

Fourthly, I move to vacate and quash the said paper upon the ground that it is insufficient as process to institute habeas corpus proceeding;

Fifthly, I move to vacate and quash the said paper upon the ground that it is irregular and void, in that it is not addressed to the Marshal or to any 2618
one; it is not signed by the Clerk of any court; it is not signed by the Clerk of the District Court; it is not under the seal of any court; it is not returnable to the District Court. It is made returnable before your Honor as a Circuit Judge; and it is not tested either in the name of the Chief Justice of the United States or the Senior Judge of the District Court.

Argument was had in support of the said motion and in opposition thereto.

An adjournment was duly taken to March 19, 1921, at 10 o'clock. 2619

March 19, 1921.

Same appearances.

The Court: Now, first of all, I have considered the memoranda which were submitted by counsel representing Mr. Craig and the Government, and I shall hold as follows: I shall deny the motions made by the Government to dismiss the proceeding upon the ground that the Circuit Judge of the United States has no jurisdiction or power to grant or issue a writ of habeas corpus, or to discharge

2620 on a writ of habeas corpus; and further, I shall deny the motion to dismiss, vacate and quash the paper of February 24, 1921, signed by the Circuit Judge, entitled "Writ of habeas corpus," which motion is made upon the ground, first, that there was no power to grant or issue a writ of habeas corpus vested in a Circuit Judge of the United States; second, that it is improvidently signed; third, that it is insufficient as a process to institute a habeas corpus proceeding; fourth; that it is irregular and void, in that it is not addressed to a marshal or to
2621 anyone, and that it is not signed by the clerk of any court and that it is not signed by the clerk of the district court; that it has no seal of any court, and is not returnable to the Distict Court, and that it is not tested either by the Chief Justice of the United States, or by the senior judge of the District Court.

At a later time I shall state my reasons in a written memorandum.

Mr. Cahill: May it please the Court, we except to your Honor's rulings on each of the motions, and to your Honor's rulings on each of the parts
2622 of this motion, and we now move that your Honor proceed to hear this application as a District Court. The purpose of that I think is apparent to your Honor, and it will serve the purpose of one side as well as the other; it will save to both the right of review, whatever your Honor's determination will be.

The Court: I think that lies largely with the applicant, what do you wish to do about it, Mr. Mooney?

Mr. Mooney: Our position is, your Honor, that the writ is issued by you as a Circuit Judge. In addition thereto, you were designated formally under the statute, and under that form of designa-

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tion you had the power and the duty in chambers of doing the act and proceedings of a District Court judge, and we therefore claim that there was super-added to your powers, if necessary, the powers and activities of a District Court judge, but you were sitting in chambers and the case is not at all unlike the old case of In re Dock Bridges, in which Mr. Justice Bradley sat, and which is headed in the report, in very large letters, "In chambers."

We insist that this proceeding shall be conducted in the way that as a matter of physical act and fact, as well as in the matter of the exercise of judicial powers, the proceeding was initiated, namely, this is a chambers matter. It was presented to you as a chambers matter, and should proceed to the end as a chambers matter.

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The Court: Well, you oppose the application?

Mr. Mooney: We do.

Mr. Cahill: In that connection, if your Honor please, it has been decided in the case of Harkrader against Wadley, 172 U. S., that if you should proceed as a district court, we would have the right of appeal. If we should so proceed now, it could be converted, in other words, under that authority, into a district court proceeding.

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The Court: I think that is true; but after all, I think it lies with the applicant to determine how he wants to proceed. He places his fortunes and misfortunes on that application.

Mr. Cahill: Well, if the Court please, I don't think it rests wholly with him. I think it is in the discretion of the court, the court having been designated to hold the district court, might well now assume jurisdiction of the matter as a district court in order to reserve to both parties the right of appeal.

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The Court: I think it lies altogether with him. He may apply to a judge or he may apply the court. If he sees fit to apply to the judge, he takes his chances.

Mr.Cahill: We except to your Honor's denial of our application.

The Court: I deny the application in view of the opposition.

Mr. Cahill: Now, if the Court please, I think it would be proper at this time for us to argue a little further our motion to dismiss for insufficiency of
2627 the pleadings. This has not been argued at all, although it has been raised in our return.

The Court: You have argued it on your brief.

Mr. Cahill: Not this particular question that I refer to.

The Court: Yes.

Mr. Cahill: On the brief submitted last Wednesday?

The Court: Yes.

Mr. Cahill: Oh, no. We raised there simply the question of your Honor's power to grant the writ and questioned the sufficiency of the writ itself.

2628 The Court: That is what I thought you referred to.

Mr. Cahill: No. Now, the point I raise is simply this, that taking the pleadings as they stand, the writ must be dismissed for insufficiency of the pleadings, upon the ground that the pleadings themselves show that the trial court had jurisdiction and that there is no other question before the court.

Mr. Caffey: The insufficiency of the pleadings is the issue that is before your Honor on this motion made by Mr. Cahill. This motion is practically a motion to dismiss on the pleadings.

The Court: I think Mr. Mooney has got the lab-

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oring car, and I think it may be well to let him argue first, to hear him first.

Counsel for the petitioner Craig then offered to prove that Judge Manton was designated to hold the District Court at that time when he issued the habeas corpus.

The Court: As to the testimony, do you object to that testimony going in?

Mr. Caffey: I certainly do, your Honor, on this law question. This law question will determine whether any of that testimony is admissible.

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The Court: Your motion now is to dismiss?

Mr. Caffey: On the pleadings.

The Court: That motion is denied.

Mr. Caffey: Exception.

The Court: Now then put in whatever you wish to offer.

Mr. Mooney: I wish to say at this juncture, if your Honor please, that I don't think any of these questions in the habeas corpus proceedings could be raised upon a motion to dismiss, and I do not wish by my conduct or by my argument to assent to any such practice as has been attempted to be introduced by the learned counsel for the govern-

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ment.

The Court: I have ruled in your favor now.

Mr. Mooney: I know your Honor has, but I wish to safeguard my rights in that respect.

We offer in evidence here the testimony taken in the court below upon the hearing which resulted in the sentencing of the petitioner, and the whole thereof.

The Court: Is there any objection to the fact that that is a true copy?

Mr. Cahill: No, we do not object to it on that ground, but we object to it as immaterial and irrelevant.

2632

The Court: Let us get it on the record. It is conceded, first, that what counsel is offering is a correct transcript of the proceedings before Judge Mayer.

Mr. Caffey: The evidence is not the whole record.

The Court: Objected to as incompetent, irrelevant and immaterial. That objection is overruled. Exception.

Mr. Mooney: It consists of two volumes.

(The papers offered were then marked Craig
2633 Exhibits 1 and 2, being the minutes of the trial before Judge Julius M. Mayer.)

Mr. Caffey: To shorten the matter, the matter of identification of all these exhibits and all these records we will assume as a matter of course that they are brought on now by this offer. We need not take the time of the court to physically identify them.

The Court: Put in all the exhibits—it is stipulated that all the exhibits which were used before Judge Mayer may be used upon this hearing. Counsel for the Government objects upon the
2634 ground that they are incompetent, irrelevant and immaterial. That objection, is overruled, and an exception is allowed to the Government.

Mr. Mooney: And my offer in that respect is that those exhibits are here and now offered in evidence before your Honor.

The Court: Yes, they are received. Exception to the Government.

Mr. Mooney: Now, there is one other thing. Colonel Caffey, and that is will you stipulate that the testimony that has been offered in evidence and the exhibits that have been offered in evidence are fore Judge Mayer?

the whole record of the testimony and exhibits be-

2635

Mr. Caffey: Well, I have not looked at it. I am presume it is the whole, and the whole of it must be before you. I am raising no technical objections at all about calling the stenographer to prove this is the record and all that sort of thing.

The Court: Suppose you run through those exhibits and see if there are any left out.

Mr. Caffey: I know that is not all. Why, that is just a minor fraction of the exhibits.

Mr. Mooney: That does not include the Government's Exhibits. Those are our Exhibits, and the Government's are listed on a separate sheet.

2636

The Court: Then the Government exhibits, I take it, will be submitted later?

Mr. Mooney: Yes.

Mr. Caffey: They are down in the clerk's office and it is up to them to submit them.

The Court: Will it be stipulated then by counsel that the clerk of the District Court will submit all the exhibits which are there? Does that cover it all?

Mr. Mooney: Yes.

Mr. Caffey: I will submit anything, sir, I have here.

2637

Mr. Mooney: Yes, as part of this record.

Mr. Caffey: I don't want to say they are all without looking at them. I am not going to be precluded by it.

The Court: No, I am not binding you by it at all.

Mr. Mooney: No. Colonel Caffey, you miss my point. My point now is I want to put a witness on the stand. Mr. Tarbox can take the stand, or you can make the concession that the stenographer's minutes that have been offered in evidence and the exhibits as marked by the clerk are the record and the whole thereof as it was before Judge Mayer,

2638

The Court: Those are the Craig exhibits, are they?

Mr. Mooney: Yes, sir.

The Court: Now, the Government exhibits are downstairs in the Clerk's office?

Mr. Mooney: Yes, sir. There is no trouble about that at all, your Honor. I want to get at the question that this is the evidence and the whole thereof.

Mr. Caffey: Of course there was no evidence except what appears in the stenographer's minutes.

2639 Mr. Mooney: And these exhibits.

Mr. Caffey: And the exhibits.

Mr. Mooney: That is satisfactory.

Mr. Mooney offered in evidence a stenographic transcript of all of the testimony taken and all of the exhibits, both the Government's and the petitioner's, in the contempt proceeding.

Counsel for the Government objected to the admission of same on the ground that they were immaterial and irrelevant.

The objection was overruled to which counsel for the Government excepted.

2640 Mr. Mooney then proceeded to argue on the merits.

Now, we wish to present these jurisdictional points to your Honor, keeping closely within the confines of the proper office of a writ of habeas corpus, upon the following four heads or propositions: That there was no jurisdiction to punish for contempt and that the court acted in excess of its powers, and without any evidence of contempt, upon the following grounds or subdivisions. First, the communication was privileged, and incidentally, that there was no publication of it. Secondly, that the matter contained in the letter was not contemptuous in substance. Thirdy, that there was

2641

nothing pending subjudice at the time the letter was written and as to that, there is an astonishing admission in the return to this writ of habeas corpus, which is sufficient in itself to sustain the writ. And fourth, that there was no misbehavior such as to obstruct the administration of justice. Fifth, the matter that I have referred to before, that there was no prayer to the information, which is a pro cedural matter.

Now, in turn, we expect to sustain those points by the following procedural points:

2642

(A) That the habeas corpus is the proper remedy.

(B) That the Circuit Court Judge may issue the same, and under that head, that he has super-added powers in this case of a judge of the District Court under the formal designation.

(D) That any judge may issue the writ, and

(C) That the return to the writ confesses or admits one of the main points, and an all-sufficient point for the granting of the writ, namely, that there was nothing pending sub judice.

2643

WILLIAM TALLMAN was called as a witness in behalf of the petitioner, being first duly sworn, testified as follows:

Direct Examination by Mr. Mooney:

Q. Mr. Tallman, will you state your official capacity, please? A. I am the chief deputy clerk of the United States District Court for the Southern District of New York.

2644

Q. And were you such, and have you been such, for a number of years, have you not? A. I have.

Q. Have you, pursuant to the request of the petitioner's counsel, produced here a resignation of Honorable Martin T. Manton, on file in the office of the Clerk of the Court?

The Court: Mr. Caffey will concede that.

A. I have.

2645

Mr. Caffey: Why, certainly. There is a correct copy of it attched here to the return. I will concede that, but I merely wish to raise the legal question that it is immaterial and irrelevant in this proceeding, and that on its face it shows that it has expired.

Mr. Mooney: Well, there is nothing in the point.

The Court: I don't know what you mean. Of course, you are trying to take advantage of this assignment, I take it.

Mr. Mooney: In other words, I want to super-add this assignment.

2646

The Court: Then put it in evidence.

Mr. Caffey: I take an exception.

The Court: Mark it in evidence.

(Paper considered, marked Petitioner's Exhibit No. 3.)

Mr. Caffey: I will stipulate that the copy of the assignment that is annexed to the traverse of the return, is a correct copy of the original.

The Court: On file in the office of the clerk?

Mr. Caffey: On file in the office of the clerk.

2647

The Witness: I would rather not have this marked, Mr. Mooney.

Mr. Mooney: All right, that is satisfactory. All right.

Q. Now, Mr. Tallman, will you please state whether—

The Court: Don't you want to put in proof as to when this proceeding started?

Mr. Mooney: Yes, sir, I am going to do that. Perhaps, we had better do it at this juncture. It is the 24th day of February—that is conceded—that the writ was issued, on the 24th day of February, 1921?

2648

Mr. Caffey: Oh, yes; I concede that the date as shown by this paper is the actual date.

Q. Mr. Tallman, will you state please, whether following the filing of this designation in the office of the clerk and on the 24th day of February, 1921, Judge Manton was actually engaged in the performance of business of the District Court and of the District Judge?

2649

Mr. Cahill: If the Court please, the same objection is made to that evidence, to this whole line of testimony.

The Court: I will take it.

Mr. Cahill: Exception.

Q. And, on the 24th day of February, 1921, will you state please, whether the business was being transacted by Judge Manton in open court, or in chambers? A. It was being transacted in chambers.

2650

Mr. Cahill: If the Court please, the same objection is made to this whole line of testimony.

The Court: Objection overruled; exception.

Q. Had there been a session of the District Court during the period of the designation just prior to that day, and if so, when? A. On the 21st day of February, the bankruptcy motion calendar was handled by Judge—presided over by Judge Man-
2651 ton, and on the next day, the 22nd or—on the 23rd day of February, the following Wednesday, he had a naturalization hearing according to my best recollection.

The Court: What do you want this for?

Mr. Mooney: I want to meet my learned friend's academic point by a physical demonstration.

The Court: I know. Even assuming that there is something in what you are claiming, the fact that there is an assignment is
2652 enough.

Mr. Mooney: I want to cover it more than that, if I may be permitted, Judge. I want to show not only that Judge Manton was performing the duties, but that nobody else was performing the duties on that day. I want to present the actual picture very briefly.

The Court: Very well.

Q. Will you look at this paper and say whether that is a summary of the business transacted by Judge Manton in the chambers on the 24th, as

2653

published in the Law Journal, the succeeding day? A. It is.

Mr. Mooney: I would like to have that marked in evidence.

Mr. Cahill: The same objection.

The Court: Objection overruled. Exception.

The exhibit is annexed hereto, marked "Exhibit 3."

Mr. Mooney: You make no objection to the fact that it is from the Law Journal instead of from his recollection? 2654

Mr. Cahill: No.

Q. Now, had Judge Knox been assigned to the holding of that District Court prior to the designation of Judge Manton, if you know? A. Yes, he had.

Q. And Judge Manton was substantially taking his place? A. He was.

Q. Now, on that day, is it a fact that Judge Knox was not passing upon current business?

2655

The Court: What do you mean by that?

Q. That is to say, Judge Knox's duties were confined to the business that was pending at the time that Judge Manton's designation was filed? A. Well, that is substantially correct, yes.

Q. In other words, Judge Knox was not attending chambers' business of the District Court on the 24th day of— A. He was not.

Q. And was anybody else, that is to say, was any other judge attending to chambers' business in the District Court or of its District Court Judge on the 24th day of February, 1921, except Judge Manton? A. No.

2656

Mr. Mooney: Is that satisfactory to you, Colonel Caffey?

The Witness: I would like to make this modification, that the Judge, according to the Law Journal, Judge Knox did sign three orders, which I looked up, and I found that one of them had to do with the bankruptcy proceedings, or an equity receivership in which he appointed a receiver, and therefore retained control of it. And the other two were bankruptcy orders in which he had previously decided the matters, and they were orders having to do with matters he had decided.

2657

The Court: Is that all, now?

The Witness: That is all.

Q. In this district, write of habeas corpus usually submitted to the judge holding chambers, are they? A. They are.

Mr. Cahill: Same objection.

The Court: Objection overruled.

Mr. Cahill: Exception.

2658

Mr. Caffey: Mr. Mooney. your questions imply that Judge Manton signed this paper, dated February 24, 1921, headed Writ of Habeas Corpus, in chambers. Do you concede that that was a fact?

Mr. Mooney: Yes, sir. In fact, I wish to prove it a fact.

Mr. Caffey: Yes, you implied it.

Mr. Mooney: I am going to do that as a next step, so that this is not only a concession, but a stipulation by attorney, that this writ of habeas corpus was presented before Judge Manton in chambers, and that he signed it in chambers.

2659

Mr. Caffey: Will you stipulate also that I appeared there in response to messenger and I raised an objection that he had no power to grant the writ of habeas corpus?

Mr. Mooney: Yes, that is a fact. That is all, thank you, Mr. Tallman.

The Court: Is that all the proof you want to put in?

Mr. Mooney: That is all the proof, sir.

Mr. Cahill then argued for the dismissal of the writ and Mr. Caffey thereafter made the closing argument for the dismissal of the writ. 2660

The respondent-appellant presents the foregoing statement of the proceedings and evidence together with the evidence in the contempt trial, beginning at page 89 and ending at page 820, and beginning at the middle of page 889 and ending at the middle of page 1128; and requests that the same be certified.

WILLIAM HAYWARD,
United States Attorney for Appellant.

2661

DAVID V. CAHILL,
Assistant United States Attorney,
of Counsel.

Petitioner's Exhibit No. 3.

This exhibit is set forth as Exhibit A Annexed to The Traverse to Return to Writ of Habeas Corpus at page 868, *supra*, and is deemed set forth here without repetition.

2662

Exhibit 3.

New York Law Journal, February 25, 1921.

UNITED STATES CIRCUIT COURT OF APPEALS.

Ford Co. vs. Hotel Woodward—Affirmed.

Armsby vs. Esrom—Reversed.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

2663

By MANTON, J.

In re Carvel SS. Co.—Motion granted.

In re Hubbard, Majestic Doll Co.—Orders of reference signed.

In re Ryweck, Hollister; Ladenburger vs. Burke; In re Am. Process Co., Herrick, Rosenstein, Ellenbogen, Morning Star Corp'n, Caristen, Cohen, Schneider, Workman, Sauer Corp'n, Ash Removals, Inc., Butchick, Romer, Pan-Am. Export Co.; Ladenburger vs. The John Burke; In re Hennevig, Razos Corp'n; Pawling Transp. vs. Coal; Kaisha vs. Cragin; In re German, Robinson; Morey vs. Nippon; In re Stroudsburg Ribbon Mills, Eastern Silk Mills, Silberman, Elk Restraurant Co., Wood Toy Co., Fair Price Poultry Co., Doughten; Guaranty Trust Co. vs. Northern Pac. R. R. Co.; New River Colleries vs. Seider; In re Aetna Garment Co.; Trumboer vs. Machinery Metals; In re Horenstein, Straits Settlement Imp. Corp'n, Kahan; Shipper Nab. Co. vs. Biele; O'Connor vs. Penn. R. R. Co.; In re Westberg; Anglo-South Am. Bank vs. Tatania; South Am. Shipping vs. Midland Coal Co; In re Lett; McLeod vs. Otto; In re Posner; N. Y. & Albany Lighterage vs. Tug Chas. McAllister; In re Black, Refining Concessionaries; N. Y. Life

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vs. Levine; In re Marcus, Rothenberg; Kahan vs. Garvan; In re Wood Toy Co., Wolitzky; Embiricos vs. SS. St. Paul; Freres vs. Same; In re Greenberg; Rubsamen vs. Shultz; Moody vs. Gramm-Bernstein, etc.;Moody vs. Gramm; In re Roberts; Writ vs. Crouch; In re Abrahams; McGusol vs. The Mariboro; Kohn vs. Eimer; In re Plaza Music Co., Supertone Talking Mach. Co. Robinson, Wyllins; Pacific Commercial vs. Wells, Fargo Co.; Keeveny vs. McCormick; In re Wonpat Products Co., Achelis vs. Frank; In re Kananack, Opler, Posner; Gaunt 2666
vs. Mendelsohn; In re McNaught, Marks, Messuri; Central Leather vs. SS. Goyaz; In re Weisz, Levy; Storch vs. Erie R. R.; In re Tropical Sales Co., Abelson, Henrick, Mervis, Ratners Restaurant, Dragon Restaurant—Order signed.

Statement of Contents of Certain Government's Exhibits, in Lieu of Setting Same Forth at Length.

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The following statement sets forth, so far as material, the contents of such of the following Exhibits as are therein described:

1. GOVERNMENT'S EXHIBIT 3, is a letter from Lewis Nixon to the District Attorney, dated October 8, 1919, enclosing copies of Government's Exhibits 1 and 2.

2. GOVERNMENT'S EXHIBITS 4, 9, 10, 11, 12, 13, 15, 16, 18, 19, 21, 22, 24, 25 and 28 are copies of New York City papers, containing a copy of the

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to have the record in the litigation printed and bound.

8. GOVERNMENT'S EXHIBITS 47 and 52 are the petition, with notice of motion, of the receiver, and the order made thereon, dated February 1, 1919, with notice of settlement thereof, granting the prayer of the petition by giving the receiver a period of six months from January 15, 1919, within which to arrive at a determination as to what con-
2669 tracts of the defendants in said suit, of which he had been appointed receiver, he should affirm or disaffirm, and within which time to make his election in that respect. GOVERNMENT'S EXHIBITS 104 and 105 are the petition of the receiver, with notice of motion, for and the order thereon, dated June 27, 1919, extending such time to December 31, 1919.

9. GOVERNMENT'S EXHIBITS 48 and 53, are the petition, with notice of motion, of the receiver, for instructions and authority, and the order made
2670 thereon, dated February 1, 1919, with notice of settlement thereof, authorizing and directing the receiver to pay interest maturing on February 1, 1919, on mortgage bonds, for which interest defendants were liable, and authorizing the receiver to borrow temporarily from time to time, on the credit of the receivership estate, such amount as he may need up to the amount of $3,000,000, on receiver's certificate, and to pledge any bonds, stock or other securities or other assets, available for such purpose, and referring the application of the receiver for the issuance of further receiver's certificates to the Special Master, to hear proof and

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letter, Government's Exhibit 2, or excerpts therefrom.

3. GOVERNMENT'S EXHIBIT 5 is a paper containing a list of names, including that of Charles L. Craig, Comptroller of New York City.

4. GOVERNMENT'S EXHIBITS 6, 7, 23, 29, 30, 32, and 33 consists of sheets of paper, the contents of which include copies of the letter, Government's Exhibit 2.

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5. GOVERNMENT'S EXHIBIT 31 is a letter, dated September 15, 1919, from Job Hedges to the members of the Board of Estimate and Apportionment, which, so far as material, referred to the enclosure of a copy of Government's Exhibit 26.

The following Exhibits, down to and including Government's Exhibit 108, are, unless otherwise indicated, of record in the suit begun by the Bill of Complaint, Government's Exhibit 34.

6. GOVERNMENT'S EXHIBIT 37 is the bond, dated December 31, 1918, of the temporary receiver appointed under the order, Government's Exhibit 36. GOVERNMENT'S EXHIBIT 39 is the report of the temporary receiver, dated January 14, 1919, setting forth his proceedings to that date under the order appointing him, Government's Exhibit 36.

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7. GOVERNMENT'S EXHIBITS 44 and 45 are the petition, with notice of motion, of the receiver for authority, and the order made thereon, dated January 27, 1919, authorizing and directing the receiver, at the expense of the receivership estate,

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arguments and make a report to the Court thereon with all convenient speed. GOVERNMENT'S EXHIBIT 67 is the report of the Special Master. GOVERNMENT'S EXHIBIT 88 is the petition of the receiver, with notice of motion, for authority to issue receiver's certificates in accordance with said report. GOVERNMENT'S EXHIBIT 91 is the affidavit of the Corporation Counsel of the City of New York upon the application. GOVERNMENT'S EXHIBIT 92 is the exceptions of the
2675 Central Union Trust Company to the report of the Special Master. GOVERNMENT'S EXHIBIT 93 is the decree dated May 29, 1919, authorizing and directing the receiver to issue receiver's certificates pursuant to said report. GOVERNMENT'S EXHIBIT 94 is the order, dated May 29, 1919, providing for the method of sale of the receiver's certificates. GOVERNMENT'S EXHIBIT 95 is the opinion of the District Judge setting forth the considerations, legal and otherwise, for the making of the decree, Government's Exhibit 93. GOVERNMENT'S EXHIBIT 108 is the opinion of the
2676 United States Circuit Court of Appeals, reported in 260 Fed., at page 550, on the appeal from the decree, Government's Exhibit 93.

10. GOVERNMENT'S EXHIBITS 49 and 64 are the petition, with notice of motion, of the receiver, dated January 22, 1919, for instructions of the Court with respect to bank loans, and the order thereon, dated March 10, 1919, directing the receiver not to pay any interest on or with respect to any bank loans.

11. GOVERNMENT'S EXHIBIT 50 is the order dated February 1, 1919, with notice of settlement

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thereof, appointing E. Henry Lacombe, Special Master, to take proof of the claims and demands against the defendants, and limiting the time for the presentation of claims to said Special Master to the 15th day of March, 1919. GOVERNMENT'S EXHIBIT 54 is the opinion of Hon. Julius M. Mayer, District Judge, dated February 3, 1919, providing for ascertainment, if the claimant prefer, of the liability and amount of damages in personal injury cases by jury trial, upon application therefor, instead of by liquidation before the 2678
Special Master. GOVERNMENT'S EXHIBIT 72 is the order, dated March 29, 1919, extending to May 1, 1919, the time limited under Government's Exhibit 50. GOVERNMENT'S EXHIBIT 82 is the order, dated April 29, 1919, extending the time of the City of New York and the Public Service Commission for the First District, to present claims and demands against the defendants New York Municipal Railway Corporation and the New York Consolidated Railroad Company until thirty days after the receiver shall have elected to affirm or disaffirm the contracts between the City 2679
of New York and said defendants, and reserving to the receiver the right to require the filing of the claims by the City within fifteen days after notice from the receiver so to do. GOVERNMENT'S EXHIBIT 83 is the order, dated May 1, 1919, extending to June 2, 1919, the time limited under Government's Exhibit 50. GOVERNMENT'S EXHIBIT 84 is the affidavit, verified May 1, 1919, of the publication of the notice requiring presentation to the receiver of claims and demands against the defendants on or before May 1, 1919. GOVERNMENT'S

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EXHIBIT 148 is the order, dated June 20, 1919, extending to July 15, 1919, the time limited under Government's Exhibit 50, and providing for publication of notice thereof. GOVERNMENT'S EXHIBIT 153 are the stenographer's minutes of the hearing resulting in said order.

12. GOVERNMENT'S EXHIBITS 55 and 56 the the petition No. 1 of the Central Union Trust Company for leave, and the order thereon, dated
2681 February 19, 1919, and entered February 20, 1919, granting said company leave to file in the United States District Court for the Southern District of New York a bill of complaint for the enforcement of its rights under the mortgages and deeds of trust of the defendants New York Municipal Railway Corporation and New York Consolidated Railroad Company, and for the collection of the debts represented by the bonds issued and outstanding under said mortgages and deeds. GOVERNMENT'S EXHIBIT 60 is the bill of complaint, with copy of mortgage annexed, filed March 1,
2682 1919, pursuant to said order, and praying for the foreclosure of the mortgages therein referred to. GOVERNMENT'S EXHIBIT 86 is the order, dated May 12, 1919, extending to June 19, 1919, the time of the defendants to plead in the suit. GOVERNMENT'S EXHIBIT 97 is the order, dated June 18, 1919, extending such time further to July 21, 1919. GOVERNMENT'S EXHIBITS 57 and 58 are the petition No. 2 of the Central Union Trust Company for leave, and the order thereon, dated February 19, 1919, and entered February 20, 1919, granting said company leave to file

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in the United States District Court for the Southern District of New York a bill of complaint for the enforcement of its rights under the mortgage and deed of trust of the defendant Brooklyn Rapid Transit Company, dated June 1, 1918, and for the collection of the debt represented by the bonds issued and outstanding under said mortgage and deed. GOVERNMENT'S EXHIBIT 61 is the bill of complaint, with copy of mortgage annexed, filed March 1, 1919, pursuant to said order and praying for the foreclosure of the mortgage therein referred to. GOVERNMENT'S EXHIBIT 85 is the order, dated May 12, 1919, extending, to June 19, 1919, the time of the Brooklyn Rapid Transit Company to plead in the suit.

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13. GOVERNMENT'S EXHIBITS 59 and 63 are the petition, with notice of motion, of the New York, Brooklyn & Manhattan Beach Railway Company for leave, and the order thereon dated February 28, 1919, granting the motion and permitting said company to sue the receiver for $10,181.67, and interest from August 8, 1916, by joining him as party defendant in action to be brought by the petitioner in the New York Supreme Court, Queens County, against the New York Municipal Railway Corporation for the purchase price of certain property therein described.

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14. GOVERNMENT'S EXHIBITS 65 and 66 are the petition of the receiver for, and the order made thereon, dated March 11, 1919, referring to E. Henry Lacombe, Esq., Special Master, the matter of the advisability of the payment by the receiver of the interest due on the first mortgage

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bonds of the Brooklyn Rapid Transit Company on April 1, 1919, to hear proofs and arguments and make a report to the Court of the facts and of his conclusions with respect thereto with all convenient speed. GOVERNMENT'S EXHIBIT 68 is the petition of the receiver for instructions with reference to some of the bonds which had been pledged. GOVERNMENT'S EXHIBIT 69 is the preliminary report of the Special Master, with reference to said bonds, recommending that the in-

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terest be not paid. GOVERNMENT'S EXHIBIT 70 is the petition, with notice of motion, of the receiver for the approval and confirmation of said report. GOVERNMENT'S EXHIBIT 71 is the order dated March 29, 1919, approving and confirming said preliminary report and directing continuance of hearings before the Special Master and the further hearing before the Court on May 5, 1919, and instructing the receiver, pending the final report of the Special Master, not to pay the interest. GOVERNMENT'S EXHIBIT 89 is the petition of the receiver for the reference to the Special

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Master of the advisability of the payment by the receiver of the interest due July 1, 1919, on the first refunding bonds of the Brooklyn Rapid Transit Company. GOVERNMENT'S EXHIBIT 90, is the order, dated May 22, 1919, referring said petition to the Special Master as prayed for therein. GOVERNMENT'S EXHIBIT 99 is the report of the Special Master, dated June 26, 1919, under the orders, Government's Exhibits 71 and 90. GOVERNMENT'S EXHIBIT 102 is the petition of the receiver, with notice of motion, for confirmation of said report. GOVERNMENT'S EXHIBIT 96 is the petition of the Equitable Trust Company,

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dated June 3, 1919, with notice of motion, praying that the matter of the surrender of the first refunding mortgage bonds of the Brooklyn Rapid Transit Company and the retirement thereby of certain certificates of indebtedness be referred to the Special Master, which was granted by order dated June 10, 1919. GOVERNMENT'S EXHIBIT 98 is the affidavit of the Corporation Counsel of the City of New York, verified June 11, 1919, in which he appeared specially for the City of New York and reserved the right, on behalf of the City, 2690
thereafter to question the jurisdiction of the Court over the parties and the subject matter of this suit, and presented suggestions to the Court, on behalf of the City and the travelling public of the City, with reference to the disposition of the foregoing petition, Government's Exhibit 102. GOVERNMENT'S EXHIBIT 103 is the order made thereon, dated June 27, 1919, directing the receiver not to pay the interest falling due on July 1, 1919, on said bonds. GOVERNMENT'S EXHIBITS 106 and 107 are the petition of the receiver, with notice of motion, for and the order thereon, dated July 2691
27, 1919, confirming the report of the Special Master with reference to the interest which became due April 1, 1919, on the mortgage bonds of the Brooklyn Rapid Transit Company, secured by its mortgage to the Equitable Trust Company, dated October 1, 1895, and directing the receiver not to pay the same.

15. GOVERNMENT'S EXHIBITS 73 and 74 are the petition of the receiver for an order ratifying and approving the receiver's action in employing his attorney and solicitor, and the order

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thereon, dated April 4, 1919, authorizing the receiver, at the expense of the receivership estate, to retain Carl M. Owen, Esq., as solicitor and attorney, and approving the acts of the receiver in theretofore retaining him as such.

16. GOVERNMENT'S EXHIBIT 75 is the opinion of Hon. Julius M. Mayer, District Judge, dated April 7, 1919, approving the report of the Special Master theretofore filed in reference to the
2693 award made by the War Department as compensation for certain dock property, belonging to the defendant New York Consolidated Railroad Company and taken by the United States for the purposes of said Department.

17. GOVERNMENT'S EXHIBITS 76 and 77 are the petition of the receiver for instructions, and the order made thereon, dated April 8, 1919, ratifying and approving the action of the receiver in taking charge of the work at East New York, theretofore carried on by the Crenshaw Engineer-
2694 ing & Construction Co., Inc., and authorizing the receiver to complete the work at the expense of the receivership estate, reserving all rights against said Engineering and Construction Company.

18. GOVERNMENT'S EXHIBITS 78 and 80 are the petition, with notice of motion, of the Central Union Trust Company for consolidation of causes, and the order made thereon, dated April 21, 1919, consolidating the suits begun respectively by the Bills of Complaint, Government's Exhibits 34 and 61. GOVERNMENT'S EXHIBIT 79 is an order, dated April 21, 1919, consolidating the suits

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begun respectfully by the Bills of Complaint, Government's Exhibits 34 and 60.

19. GOVERNMENT'S EXHIBIT 81 is the order, dated April 28, 1919, with notice of entry thereof on said day, granting leave to the Equitable Trust Company of New York to intervene in the United States District Court for the Southern District of New York, *pro interesse suo* solely to intervene against the execution of the order of the Court in the matter of Award of War Department for Dock Property.

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20. GOVERNMENT'S EXHIBIT 87 is the petition, with notice of motion, of the receiver for authority and direction to affirm the contract entered into between the New York Municipal Railway Corporation and the City of New York, dated March 19, 1913, known as Contract No. 4 (as modified by contract dated October 5, 1916) and two certificates for additional tracks and extensions, dated March 19, 1913, which was granted by order dated August 12, 1919.

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21. GOVERNMENT'S EXHIBITS 100 and 101 are the petition of the receiver for instructions, with notice of motion, and the order made thereon, dated June 27, 1919, authorizing the receiver, at the expense of the receivership estate, to take such action and make such expenditures as are necessary to preserve the corporate existence of the defendant companies.

The following exhibits, down to and including Government's Exhibit 209, are, unless otherwise

2698

indicated, of record in the suit begun by the Bill of Complaint, Government's Exhibit 109.

22. GOVERNMENT'S EXHIBIT 112 is the bond, dated March 20, 1919, of the receiver appointed under the order, Government's Exhibit 111, which was approved on its date.

23. GOVERNMENT'S EXHIBIT 115 is the petition of the National Surety Company, verified
2699 March 31, 1919, with notice of motion thereon, for the insertion of certain provisions in the order to be made appointing a permanent receiver. GOVERNMENT'S EXHIBIT 116 is the order, dated March 31, 1919, appointing Job Hedges permanent receiver, in form substantially the same as Government's Exhibit 43. GOVERNMENT'S EXHIBIT 117 is the consent and agreement of the surety on the bond of the temporary receiver, under the order dated March 20, 1919, that the bond should stand to secure the faithful discharge by the permanent receiver of the duties of his trust as such, under
2700 order, Government's Exhibit 116, dated March 31, 1919, duly approved April 10, 1919, by Hon. Julius M. Mayer, United States District Judge.

24. GOVERNMENT'S EXHIBITS 118 and 119 are the petition for and the order made thereon, dated April 2, 1919, appointing Messrs. Winthrop & Stimson, as solicitors and counsel for the receiver.

25. GOVERNMENT'S EXHIBIT 120 is the stenographer's minutes of the hearing before Hon. Julius M. Mayer, United States District Judge, on the applications resulting in the approval of Gov-

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ernment's Exhibit 117 and the making of the orders, Government's Exhibits 121 and 122.

26. GOVERNMENT'S EXHIBIT 121 is the petition of the receiver and notice of motion for, and the order thereon, dated April 10, 1919, authorizing and directing the receiver, at the expense of the receivership estate, to have the record in the suit printed.

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27. GOVERNMENT'S EXHIBIT 122 is the notice of motion for and order, dated April 10, 1919, directing notice by publication for claims and demands against the defendant, New York Railways Company, and directing that all claims and demands against said defendant should be presented to the receiver on or before the 16th day of June, 1919.

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28. GOVERNMENT'S EXHIBIT 123 is the petition of the Eighth Avenue Railroad Company, verified April 11, 1919 (with order to show cause thereon), to be permitted to intervene as a party defendant in the cause and for instructions and directions to the receiver to immediately pay and discharge rents due said company, and all liens upon the property of said company under lease, or for the return of the properties of said company by the receiver, together with order directing the receiver and parties herein to show cause on April 21, 1919, why the relief prayed for in the petition should not be granted. GOVERNMENT'S EXHIBIT 124 is the answer of the receiver, verified April 21, 1919, to said petition. GOVERNMENT'S EXHIBIT 125 is the affidavit of the Corporation

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Counsel of the City of New York, verified April 21, 1919, in which he appeared specially for the City of New York and reserved the right on behalf of the City thereafter to question the jurisdiction of the Court over the parties and the subject matter of this suit, and presented suggestions to the Court on behalf of the City and the travelling public of the City with reference to the disposition of the foregoing petition. GOVERNMENT'S EXHIBIT 126 is the petition of the Ninth Avenue Railroad
2705 Company, verified April 11, 1919 (with order to show cause thereon), to be permitted to intervene as a party defendant in the cause, and for instructions and directions to the receiver to immediately pay and discharge rents due said company, and all liens upon the property of said company under lease, for the return of the properties of said company by the receiver, together with order directing the receiver and parties herein to show cause on April 21, 1919, why the relief prayed for in the petition should not be granted. GOVERNMENT'S EXHIBIT 127 is the answer of the receiver, veri-
2706 fied April 21, 1919, to said petition. GOVERNMENT'S EXHIBIT 128 is the affidavit of the Corporation Counsel of the City of New York, verified April 21, 1919, in which he appeared specially for the City of New York and reserved the right on behalf of the City thereafter to question the jurisdiction of the Court over the parties and the subject matter of this suit, and presented suggestions to the Court on behalf of the City and the travelling public of the City with reference to the disposition of the foregoing petition. GOVERNMENT'S EXHIBIT 129 is the stenographic minutes of the hearing upon said petition, setting forth the argu-

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ments of counsel and the conclusion of the Court resulting in the orders, Government's Exhibits 130 and 131. GOVERNMENT'S EXHIBIT 130 is the order, dated April 30, 1919, denying said petition of the Eighth Avenue Railroad Company. GOVERNMENT'S EXHIBIT 131 is the order, dated April 30, 1919, denying said petition of the Ninth Avenue Railroad Company.

29. GOVERNMENT'S EXHIBIT 132 is the stenographer's minutes of the hearing, April 21, 1919, on the application for the appointment of a Special Master. GOVERNMENT'S EXHIBIT 133 is the order thereon, dated April 21, 1919, after such hearing appointing Francis M. Scott, Esq., Special Master in this cause, with the usual powers exercised under the rules of this Court by Special Masters in like cases, and directing the Special Master to take proof of the amount of all claims and demands against the defendant which might be presented to the receiver herein pursuant to the order, Government's Exhibit 122; except claims thereafter ordered by the Court to be otherwise proved and except claims for personal injuries or injuries to property sustained in the operation of the road and to report the same to the Court with his conclusions as to each of said claims and demands with all convenient speed.

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30. GOVERNMENT'S EXHIBIT 134 is the petition of the receiver for leave to employ engineers and accountants to make an examination of the property and finances of the defendant. GOVERNMENT'S EXHIBIT 135 is the order thereon, dated April 28, 1919, authorizing the employment

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of engineers and accountants for that purpose. GOVERNMENT'S EXHIBIT 136 is the stenographer's minutes of the hearing upon which said last mentioned order was made.

31. GOVERNMENT'S EXHIBIT 137 is the stenographer's minutes on the hearing, May 15, 1919, in which the Court heard counsel for the receiver and others in the applications of the receiver to be permitted to enter into contracts for
2711 paving and to purchase steel rails and for instructions with reference to the filing of the receiver's accounts, and in which the Court granted the motions of the receiver for authority to execute the paving contracts and to purchase the steel rails, and approved the proposed order requiring the filing of the receiver's accounts with the Special Master.

32. GOVERNMENT'S EXHIBIT 138 is the petition of the receiver for the instructions of the Court in reference to the Broadway and Seventh
2712 Avenue Railroad Company lease. GOVERNMENT'S EXHIBIT 139 is the order made thereon, dated May 29, 1919, directing the receiver to pay out of the funds in his possession as receiver, interest, taxes and other amounts set forth in said petition. Said order further contained a clause reading as follows:

> "(d) Any such payment so made by the Receiver shall be deemed to be made for account of whom it may concern, and shall in no way affect the right of the Receiver to affirm or disaffirm the lease made to the Houston,

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West Street and Pavonia Ferry Railroad Company by the Broadway and Seventh Avenue Railroad Company, dated the 13th day of May, 1890, the Court further reserving all equities as between the respective parties."

33. GOVERNMENT'S EXHIBIT 140 is the affidavit, verified May 29, 1919, of the Corporation Counsel of the City of New York, appearing specially and reserving the right on behalf of the City to question the jurisdiction of the Court over the parties and the subject matter of the suit and for the special purpose of suggesting to the Court the insertion of the words quoted above from Government's Exhibit 139, in any order made by the Court upon the petition, Government's Exhibit 138.

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34. GOVERNMENT'S EXHIBIT 141 is the stenographer's minutes of the hearing, June 10, 1919, setting forth the proceedings on the applications of the receiver for instructions with reference to (1) the contracts for transfers from the municipal ferry which was adjourned to June 12, 1919 (see Government's Exhibit 145); (2) filing the receiver's accounts, in which the Court announced the signing of the order as of June 10, on the motion heard May 15, relative to the filing of the receiver's accounts; and (3) payment of interest and rental of the 23rd Street Railway Company, in which the Court granted the motion of the receiver for authority to pay the same.

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35. GOVERNMENT'S EXHIBIT 142 is the petition of the Farmers Loan & Trust Company for leave to foreclose adjustment mortgage, dated Jan-

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uary 1, 1912, made by the defendant to said Farmers Loan & Trust Company, as Trustee, and GOVERNMENT'S EXHIBIT 143 is the order dated June 6, 1919, granting leave to said Company to file in the United States District Court for the Southern District of New York the bill of complaint for such foreclosure, with the defendant and the receiver among the parties defendant thereto. GOVERNMENT'S EXHIBIT 144 is the Bill of Complaint filed June 6, 1919, pursuant to the
2717 order, Government's Exhibit 143, for the foreclosure of the mortgage therein referred to, with a copy of the mortgage annexed to the bill as Exhibit A, and in form substantially the same as Government's Exhibit 60. GOVERNMENT'S EXHIBIT 158 is the consent of Job Hedges, Esq., to his appointment as receiver of the property of the defendant covered by and described in the mortgage for the foreclosure of which suit was begun by Bill of Complaint, Government's Exhibit 144. GOVERNMENT'S EXHIBIT 159 is the formal consent of the receiver's surety to the extension
2718 of his bond to secure the discharge of the receiver's duties in said foreclosure suit, as if originally made and filed in said cause.

36. GOVERNMENT'S EXHIBIT 145 is the stenographer's minutes on the hearing June 12, 1919, on the application of the receiver for instructions with respect to the municipal ferry transfers, resulting in instructions to the receiver "to take up negotiations with a view of seeing whether with due respect to the interests of the property, some transfer arrangement could be made which would accommodate the Staten Island situation without a depreciation of the property."

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37. GOVERNMENT'S EXHIBIT 146 is the second petition of the Eighth Avenue Railroad Company for the return to it of the property held by the defendant under lease. GOVERNMENT'S EXHIBIT 150 is the answer of the receiver to said petition. GOVERNMENT'S EXHIBITS 161 (see also below) and 163 are the stenographer's minutes of the hearings, resulting in the order, GOVERNMENT'S EXHIBIT 164, which is the order thereon, dated June 15, 1919, directing the receiver to return the property of the Eighth Avenue Railroad 2720
Company to it and to cease operation of the lines and property of said Company leased to the defendant. GOVERNMENT'S EXHIBIT 172 is the plan submitted to the Court by the railroad company, indicating the service to be rendered by said Company upon the return of its property by the receiver, upon which, among other things, the order, Government's Exhibit 164, was made. GOVERNMENT'S EXHIBIT 169 is the agreement, dated July 15, 1919, between the receiver and the Eighth Avenue Railroad Company, providing for the leasing by said company to the receiver of certain 2721
realty and equipment, for the supply of electric power, and for trackage rights, for the benefit of railroads still operated by the receiver, and for the interchange of passengers at certain points upon transfers.

38. GOVERNMENT'S EXHIBIT 147 is the second petition of the Ninth Avenue Railroad Company for the return to it of the property held by the defendant under lease. GOVERNMENT'S EXHIBIT 151 is the answer of the receiver to said petition. GOVERNMENT'S EXHIBITS 157

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and 161 (see also above) are the stenographer's minutes of the hearing on said petition. GOVERNMENT'S EXHIBIT 173 is the plan submitted to the Court by the railroad company, indicating the service to be rendered by said Company upon the return of its property by the receiver, upon which, among other things, the order, Government's Exhibit 204, was made. GOVERNMENT'S EXHIBITS 188 and 189 are the affidavit of the receiver, verified September 4, 1919, and notice of

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presentation thereof to the Court on September 9, 1919, relating to the operation of the Ninth Avenue Railroad by the receiver, upon which, among other things, the order, Government's Exhibit 204, was made. GOVERNMENT'S EXHIBIT 201 (see also below) is the stenographer's minutes of the hearings upon which the orders, Government's Exhibits 204, 205, 206 and 207, were made. GOVERNMENT'S EXHIBIT 204 is the order, dated September 26, 1919, directing the receiver to cease operation of the railroad lines of the Ninth Avenue Railroad Company and to re-

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turn to said company the property leased by it to the New York Railways Company. GOVERNMENT'S EXHIBITS 205, 206 and 207, are the order, dated September 30, 1919, together with the schedules 1 and 2 thereto annexed, approving the agreement, dated September 27, 1919, entered into between the receiver and the Ninth Avenue Railroad Company, setting forth the specific property to be returned and the cars to be supplied by the receiver to the Company and the manner and circumstances of the return. GOVERNMENT'S EXHIBIT 203 is the affidavit of the receiver's Auditor, giving certain data concerning the property

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affected by Government's Exhibits 205, 206 and 207. GOVERNMENT'S EXHIBIT 202 is the stenographer's minutes of the hearing, October 1, 1919, at which the Court directed that the questions arising upon Government's Exhibit 203 might be brought on at any time after November 1, 1919, after a month's operation under the agreement dated September 27, 1919, approved by Government's Exhibit 205.

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39. GOVERNMENT'S EXHIBIT 149 is the petition of the receiver, verified June 18, 1919, for instructions as to the operation of cars over the Williamsburgh Bridge. GOVERNMENT'S EXHIBIT 160 is the affidavit of the Corporation Counsel of the City of New York, verified June 25, 1919, in which he appeared specially for the City of New York and reserved the right on behalf of the City thereafter to question the jurisdiction of the Court over the parties and the subject matter of this suit, and presented suggestions to the Court on behalf of the City and the travelling public of the City with reference to the disposition of the foregoing petition. GOVERNMENT'S EXHIBITS 198 and 199 are affidavits of John Bauer, verified September 11, 1919, and Frederick T. Wood, verified September 19, 1919, setting forth certain data with reference to the operation of cars over the Williamsburgh Bridge. GOVERNMENT'S EXHIBIT 197 is the stenographer's minutes of the hearing, before the District Judge, September 22, 1919, at which the Judge took under advisement the question of whether he would send the matter to the Master or having a hearing in Court before himself in regard to the essential features of the matter.

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2728 *Statement of Contents of Certain Government's Exhibits.*

40. GOVERNMENT'S EXHIBIT 152 is the petition of the Farmers Loan & Trust Company, as Trustee, for consolidation of the suit begun by Bill of Complaint, Government's Exhibit 144, with the suit begun by the Bill of Complaint, Government's Exhibit 109. GOVERNMENT'S EXHIBIT 154 is the stenographer's minutes of the hearing on said petition. GOVERNMENT'S EXHIBIT 155 is the order made thereon, dated July 1, 1919, consolidating the two suits and extending the receivership to
2729 the foreclosure suit. GOVERNMENT'S EXHIBIT 156 is the stenographer's minutes of the hearing resulting in said order.

41. GOVERNMENT'S EXHIBIT 162 is the stenographer's minutes of the hearing, July 14, 1919, resulting in the decision of the Court authorizing the payment of interest, to and including October 2, 1919, on the note of the Guaranty Trust Company for $400,000, on the understanding that the Trust Company will extend the time of payment of the note to October 7th, 1919.

2730 42. GOVERNMENT'S EXHIBIT 168 is the petition of the Guaranty Trust Company for leave to file its Bill of Complaint for the foreclosure of the First Real Estate and Refunding Mortgage made by defendant. GOVERNMENT'S EXHIBIT 167 is the order thereon, dated July 11, 1919, granting such leave. GOVERNMENT'S EXHIBIT 166, is the petition for and GOVERNMENT'S EXHIBIT 165 is the order dated July 14, 1919, extending the receivership herein to the property and assets of the defendant, covered and described in said mortgage. GOVERNMENT'S EXHIBIT

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171 is said mortgage made by the defendant to Guaranty Trust Company of New York, dated January 1, 1912, securing its First Real Estate and Refunding Mortgage 4% Gold Bonds, aggregating in amount $18,024,000, face value of bonds, and $36,655.26 face value of the scrip, which is convertible when presented in amounts of $1,000 into equivalent amounts of bonds. GOVERNMENT'S EXHIBIT 170 is the Bill of Complaint verified July 11, 1919, for the foreclosure of said mortgage (in form substantially the same as Government's 2732
Exhibit 60). GOVERNMENT'S EXHIBIT 178 is the Answer of the defendant Railways Company to said Bill of Complaint admitting substantially all the allegations of the Bill, except that the Trust Company had been requested to declare the mortgage due and to foreclose the same; and praying that proof thereof be required. GOVERNMENT'S EXHIBIT 179 is the answer of the receiver to said Bill, denying certain allegations of the Bill and praying that proof there be required. GOVERNMENT'S EXHIBIT 184 is the petition for the consolidation of the suit begun by said Bill 2733
of Complaint with this cause. GOVERNMENT'S EXHIBIT 185 is the order, dated September 11, 1919, consolidating the causes as prayed for in said petition. GOVERNMENT'S EXHIBIT 193 is the stenographer's minutes of the hearing, September 11, 1919, upon which said order was made.

43. GOVERNMENT'S EXHIBITS 174, 175, 176 and 177 are the report of the receiver, dated July 31, 1919, with schedules thereto annexed, as to his application to the Public Service Commission of the State of New York for the First District, to be

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relieved of statutory requirements and orders of the Commission, in reference to the issuance and acceptance of transfers, and of the action taken thereon by the said Commission, which authorized the receiver to charge, in addition to the regular fare, two cents for each transfer demanded by a passenger desiring to make one continuous trip, or take one continuous ride between points on lines owned, operated or controlled by the defendant or its receiver and points on other roads, at and only

2735 at such points as the Commission was empowered by law to authorize them to charge for transfers.

44. GOVERNMENT'S EXHIBIT 181, is the petition of the Central Union Trust Company of New York for and GOVERNMENT'S EXHIBIT 180 is the order thereon, dated September 11, 1919, granting said Trust Company leave to make the receiver a party to the Bill of Complaint to be filed by it for the foreclosure of the mortgage, dated April 1, 1889, and executed by the South Ferry Railroad Company to said Trust Company.

2736 GOVERNMENT'S EXHIBIT 194 is the stenographer's minutes of the hearing upon which the Court made said order. GOVERNMENT'S EXHIBITS 182 and 183 are the Bill of Complaint filed September 11, 1919 (in form substantially the same as Government's Exhibit 60) for the foreclosure of said mortgage, and Exhibit A annexed thereto, viz., a copy of said mortgage.

45. GOVERNMENT'S EXHIBIT 186 is the petition of the receiver for instructions with reference to the continuance of operation of the car lines in the City of New York operated by storage batteries.

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GOVERNMENT'S EXHIBIT 187 is the order, dated September 12, 1919, authorizing and directing the receiver to discontinue the operation of such lines. GOVERNMENT'S EXHIBIT 192 is the affidavit of the receiver's Auditor, verified September 12, 1919, presenting certain data to the Court, upon which in part, it based said order. GOVERNMENT'S EXHIBIT 195 is the stenographer's minutes of the hearing upon which the Court made said order.

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46. GOVERNMENT'S EXHIBIT 191 is the petition of the receiver for instructions as to the discontinuance of the arrangements for transfers with the Eighth Avenue Railroad Company. GOVERNMENT'S EXHIBIT 190 is the order made thereon, dated September 10, 1919, directing the Eighth Avenue Railroad Company, and parties in the cause to show cause why the relief prayed for in the petition should not be granted and providing for the method of service of said order to show cause. GOVERNMENT'S EXHIBITS 196, 200 and 201 (see also above) are the stenographer's minutes of the hearings on said petition, upon which the Court announced its decision to direct discontinuance of the interchange of transfers with the Eighth Avenue Railroad Company.

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47. GOVERNMENT'S EXHIBIT 208 is the order dated September 30, 1919, directing the receiver to pay the interest due October 1, 1919, on the mortgage dated April 1, 1896, made by the 34th Street Crosstown Railway Company, whose railroad was operated by the defendant New York Railways Company under an agreement guarantee-

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ing the payment of such interest. GOVERNMENT'S EXHIBIT 209 is the petition of the receiver for instructions upon which said order was made.

The following Exhibits, down to and including Government's Exhibit 225, except Government's Exhibit 224, are, unless otherwise indicated, of record in the bankruptcy proceeding begun by the Petition, Government's Exhibit 210.

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48. GOVERNMENT'S EXHIBIT 210 is the Creditors' Petition, dated March 21, 1919, in the bankruptcy proceeding instituted against Interborough Consolidated Corporation, upon which the adjudication, Government's Exhibit 213, was made. GOVERNMENT'S EXHIBIT 211 is the application of the petitioning creditors for the appointment of a receiver pending adjudication in bankruptcy. GOVERNMENT'S EXHIBIT 212 is the order, dated March 31, 1919, made thereon, appointing James R. Sheffield, Esq., Temporary Receiver in Bankruptcy of the property, assets and effects of Interborough Consolidated Corporation. GOVERNMENT'S EXHIBIT 213 is the adjudication in bankruptcy of Interborough Consolidated Corporation, made on the petition, Government's Exhibit 210, and the order of reference to Macgrane Coxe, Esq., as Referee. GOVERNMENT'S EXHIBIT 214 is the certificate of election of James R. Sheffield, Esq., as Trustee of Interborough Consolidated Corporation, at creditors' meeting held on April 25, 1919, and approval by the referee of the Trustee's election. GOVERNMENT'S EX-

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HIBIT 215 are the Schedules in Bankruptcy filed by the Interborough Consolidated Corporation. GOVERNMENT'S EXHIBIT 216 is the order, dated April 26, 1919, by the Referee in Bankruptcy, approving the bond of the Trustee. GOVERNMENT'S EXHIBIT 217 is the order of the referee dated May 12, 1919, authorizing the Trustee to retain Messrs. Levintritt, Cook, Nathan & Lehman, as his attorneys and counsel. GOVERNMENT'S EXHIBIT 218 is the notice to creditors, dated May 21, 1919, of the presentation of the receiver's account. GOVERNMENT'S EXHIBIT 219 is the report of the referee, dated June 7, 1919, approving the receiver's account. GOVERNMENT'S EXHIBIT 220 is the order of the District Court, dated June 24, 1919, approving the referee's report. GOVERNMENT'S EXHIBIT 221 is the first report of the Trustee, dated July 30, 1919, of his acts and proceedings as Trustee to that date. GOVERNMENT'S EXHIBITS 222 and 223 are together the same as Government's Exhibit 26. GOVERNMENT'S EXHIBIT 224 is the circular letter, dated December 8, 1919, signed by the Trustee of Interborough Consolidated Corporation and the receivers of the New York Railways Company and Brooklyn Rapid Transit Company. GOVERNMENT'S EXHIBIT 225 is the order, dated October 2, 1919, of the Referee in Bankruptcy extending to December 1, 1919, the Trustee's time to file a second report.

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49. GOVERNMENT'S EXHIBIT 114 is an affidavit, verified March 31, 1919, of record in the suit begun by the Bill of Complaint, Government's Exhibit 109, made by the Corporation Counsel of the

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City of New York appearing specially and reserving the right on behalf of the City thereafter to question the jurisdiction of the Court over the parties and the subject matter of the suit and for the special purpose of suggesting to the Court facts on behalf of the City with reference to its interest in the operation of the transit lines in the City of New York, upon which the order appointing permanent receiver in said suit, Government's Exhibit 111, was made.

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Government's Exhibit No. 26—(198) 2749
Opinion of Mayer, J., in re Report of Stone & Webster.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

WESTINGHOUSE ELECTRIC AND MANUFACTURING COMPANY,
Plaintiff,
against
BROOKLYN RAPID TRANSIT COMPANY, NEW YORK MUNICIPAL RAILWAY CORPORATION and NEW YORK CONSOLIDATED RAILROAD COMPANY,
Defendants.

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THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,
Plaintiff,
against
NEW YORK RAILWAYS COMPANY,
Defendant.

In the Matter
of the
INTERBOROUGH CONSOLIDATED CORPORATION,
Bankrupt,
CENTRAL UNION TRUST COMPANY OF NEW YORK,
Plaintiff,
against
BROOKLYN RAPID TRANSIT COMPANY, NEW YORK MUNICIPAL RAILWAY CORPORATION, NEW YORK CONSOLIDATED RAILROAD COMPANY and LINDLEY M. GARRISON, as Receiver, etc., et al.,
Defendants.

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MAYER, District Judge:

Messrs. Stone & Webster, acknowledged experts of high standing, were employed some months ago by direction of the Court, to undertake, among other things, an investigation of the financial con-

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dition of the properties affected by the receiverships pending in this Court. This independent expert inquiry is now nearing completion and the Court is awaiting the final report of Messrs. Stone & Webster, in respect of essential features of the transportation problems, including questions relating not only to financial conditions, but also to operation, property valuations and other important subjects.

Since this inquiry was begun, the financial difficulties of the roads have grown greater instead of
2753 less. The recent increase in wage cost made necessary the request by the Court for immediate information, to which Messrs. Stone & Webster have answered, as appears by their letter, a copy of which is annexed.

This report, especially the statement that the surface lines in the charge of the Court's Receivers are failing by about $200,000 a month to earn their actual operating expenses, indicates a grave and immediate crisis. It is impossible to forecast the serious results which lack of financial aid may bring about, affecting most vitally the welfare of the peo-
2754 ple of the City of New York. Manifestly lines cannot long be operated at an actual loss. The problems involved press for calm and serious consideration and an earnest and united effort toward prompt solution. That some means must be devised for at least temporary relief seems plain and urgent.

That plans should be worked out for determining the permanent status of the transportation companies and their legal and financial relations to the State and Municipal Governments, seems an obvious duty, the performance of which should be promptly undertaken.

The legal, financial and governmental questions involved are numerous and intricate and, natur-

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ally, there are differing views as to the wise and proper policies to be adopted.

Because the problems presented are so grave and the emergency is so pressing, and disaster so imminent, every good citizen must feel that the effort to solve these problems should be undertaken promptly and as nearly free from controversy, political or otherwise, as possible.

In order that the gravity of the situation may be generally made known and that some appropriate action may be taken as speedily as is consistent with full information, the Receivers are instructed 2756
to send a copy of the summary of Messrs. Stone & Webster and of this memorandum to the State and Municipal authorities, and to civic and taxpayers' associations of the Greater City. At the same time, the Receivers will make it clear that every facility will be afforded, both to public officials and citizens' associations to satisfy themselves in respect of the actual financial and other conditions existing in relation to the corporations now in their official charge.

Meanwhile, it is earnestly hoped that all who have official duties to perform, whether by State, 2757
Municipal or Legislative action, will reserve their judgment and conclusions on the fundamental questions involved, until they shall have had adequate opportunity to satisfy themselves of the facts and of the real conditions existing. Such a course will enable all concerned to arrive at a just determination, based (as all just determinations must be), on an accurate knowledge of the facts.

JULIUS M. MAYER,
District Judge.

September 6, 1919.

2758

STONE & WEBSTER

120 Broadway, New York

September 4, 1919.

Honorable Julius M. Mayer,
United States District Judge,
New York City.

Dear Sir:

2759 In compliance with your request for information regarding the effect which the recent increase in wages will have upon the financial position of the properties in charge of your Receivers, we give you below, our estimate of the operating results of the various properties for the twelve months beginnning September 1, 1919.

We may add that the various operating officials are in substantial accord with our conclusions:

Surface Lines in Manhattan (New York Railways Company) in Charge of Receiver Hedges:

2760 For the twelve months the aggregate operating deficit of these lines will be about $1,113,000

Surface Lines of Brooklyn in Charge of Receiver Garrison:

For the twelve months the aggregating operating deficit of these lines will be about 1,268,000

Total Operating Deficit of the Surface Lines of the two Boroughs for the twelve months 2,381,000

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This means that the income of these surface lines will fail by about $200,000 per month to provide actual operating expenses and taxes *without any provision for bond interest, rentals and other fixed charges,* and will fail by about $853,000 per month to earn these fixed charges.

Upon the basis of the present cost of materials, and supplies, rates of wages and fares, there is no prospect that these surface lines will earn their operating expenses and taxes for years to come, if ever.

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Subway and Elevated Lines in Manhattan Operated by Interborough Rapid Transit Company, whose Stock is in the hands of James R. Sheffield, Trustee in Bankruptcy, of the Interborough Consolidated Corporation.

These lines, which in the fiscal year 1917, earned a surplus of $8,885,358.52 above all fixed charges, will for the next twelve months fail to earn fixed charges including the interest on the Company's $200,092,000 of outstanding bonds and notes (most of which were issued to provide for the Company's share of the cost of the Subways) by about $9,880,000

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Elevated and Subway Lines in Brooklyn (Brooklyn Rapid Transit Company) in Charge of Receiver Garrison:

These lines, which in the fiscal year 1917, earned a surplus of $1,523,457 above all fixed charges, will for the next twelve months (after the payment of interest upon the recently issued Receiver's Cer-

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tificates and upon the underlying mortgages) fail to earn the interest on the Company's $60,000,000 of outstanding bonds and notes issued to provide in part for the Company's investment in the new Subways by about $2,798,000

Upon the present basis of prices for materials and supplies, rates of wages and fares, there is no hope that the Elevated and Subway Lines of either Borough will earn interest upon the Companies' investment in the Subways for many years to come, if ever.

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Yours very truly,

(Signed) STONE & WEBSTER.

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Government's Exhibit No. 34—Bill of Complaint. 2767

IN THE

DISTRICT COURT OF THE UNITED STATES,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

WESTINGHOUSE ELECTRIC AND MANUFACTURING COMPANY, Plaintiff, against BROOKLYN RAPID TRANSIT COMPANY, NEW YORK MUNICIPAL RAILWAY CORPORATION and NEW YORK CONSOLIDATED RAILROAD COMPANY, Defendants.	In Equity E15—347.

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TO THE HONORABLE THE JUDGES OF THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK: 2769

The plaintiff, Westinghouse Electric and Manufacturing Company, a corporation duly organized and existing under the laws of the State of Pennsylvania, and a citizen of said state, brings this its bill of complaint on its own behalf and on behalf of all creditors of the defendants herein who may hereafter join in the prosecution of this suit, against the Brooklyn Rapid Transit Company, New York Municipal Railway Corporation

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and New York Consolidated Railroad Company, corporations organized and existing under and by virtue of the laws of the State of New York and citizens of said state, and thereupon plaintiff alleges as follows:

FIRST.—The plaintiff, Westinghouse Electric and Manufacturing Company, is a corporation duly organized and existing under the laws of the State of Pennsylvania and a citizen and resident of said state.

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SECOND.—On information and belief that the defendants Brooklyn Rapid Transit Company (hereinafter termed the Transit Company), New York Municipal Railway Corporation (hereinafter termed the Subway Company), and New York Consolidated Railroad Company (hereinafter termed the Consolidated Company), and each of said defendants at all the times hereinafter mentioned were and are now corporations duly organized and existing under and by virtue of the laws of the State of New York and citizens and resi-

2772 dents of said state.

THIRD.—The ground upon which the jurisdiction of the court depends in this suit is the diversity of citizenship of the plaintiff and of the defendants and the amount in controversy herein is in excess of the sum of $5,000, exclusive of interest, costs and expenses. This suit is brought for the purpose of enforcing the claims of the plaintiff against the Transit Company and against the Subway Company, for the appointment of a receiver or receivers of said Companies and of the Consolidated Company; the determination of the claims

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of the creditors of said three Companies; the marshalling of the assets of said Companies and the sale and distribution of said assets among their respective creditors; and for the other relief hereinafter set forth.

FOURTH.—The Transit Company is indebted to the plaintiff in the sum of $40,235.72 with interest thereon, for electrical equipment, materials and supplies heretofore sold and delivered by the plaintiff to the Transit Company at its request. Said sum is wholly unpaid and there are no offsets or counterclaims thereto.

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FIFTH.—The Subway Company is indebted to the plaintiff in the sum of $6,225.00, with interest thereon, for electrical equipment, materials and supplies heretofore sold and delivered by the plaintiff to the Subway Company at its request. Said sum is wholly unpaid and there are no offsets or counterclaims thereto.

SIXTH.—On information and belief that the Transit Company was organized under the laws of the State of New York on or about January 18, 1896, and has outstanding 745,200 shares of capital stock of the par value of $100 each.

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SEVENTH.—On information and belief that the Consolidated Company has outstanding 50,000 shares of preferred stock and 139,000 shares of common stock, of the par value of $100 each, of which 47,854.8539 shares of preferred stock and 131,800.3063 shares of common stock are owned by the Transit Company.

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EIGHTH.—On information and belief that the Subway Company has outstanding 2,000 shares of capital stock of the par value of $100 each, all of which are owned by the Consolidated Company, and that the Subway Company has also outstanding $60,000,000 face amount of First Mortgage Five Per Cent. Sinking Fund Gold Bonds (Series A) bearing the endorsement of the Consolidated Company guaranteeing and assuming and agreeing to pay the principal and interest of said bonds and the sinking fund provided for in the mortgage se-
2777 curing the same and bearing also the endorsement of the Transit Company assuming and agreeing to pay said principal, interest and sinking fund, $57,735,000 face amount of which said bonds of the Subway Company are owned by the Transit Company and pledged by it as part of the collateral security for the Notes of the Transit Company hereinafter mentioned.

NINTH.—On information and belief that the Transit Company is also the owner of stock of various other companies, including the following:

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Name of Company	Owned by Transit Company No. of shares of stock.
The Nassau Electric Railroad Company.	63,670.75
Coney Island & Gravesend Railway Company	3,500.00
South Brooklyn Railway Company	4,991.00
Bridge Operating Company	500.00
The Brooklyn Heights Railroad Company	1,987.00
Brooklyn, Queens County and Suburban Railroad Company	19,991.00

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and of various bonds and certificates or evidences of indebtedness of said respective companies, and also controls Coney Island & Brooklyn R. R. Co. through ownership of stock of said Company by Coney Island & Gravesend Ry. Co.

TENTH.—On information and belief, that the Subway Company, the Consolidated Company and the other companies hereinbefore referred to own or lease and operate various lines of street, surface, elevated and subway railways in the boroughs of Manhattan, Brooklyn and Queens in the City 2780
of New York, all of which are controlled by the Transit Company by reason of the stock ownership hereinbefore set forth.

ELEVENTH.—On information and belief, that the Transit Company also owns and leases and is engaged in the operation of power houses, power plants and sub-stations in the Boroughs of Manhattan and Brooklyn in the City of New York, for the generation and supply of electrical energy required for the operation of the aforesaid lines of street surface, elevated and subway railways, 2781
and generates and supplies the electrical energy necessary for the operation thereof, and the Transit Company also owns or leases and is engaged in the operation of shops, car-barns, real estate and other facilities necessary for the maintenance and repair of said lines of railway and of the equipment appurtenant thereto and is engaged in the maintenance, repair and upkeep of said lines of railway and equipment.

TWELFTH.—On information and belief, that the Subway Company was organized under the laws

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of the State of New York for the purpose of maintaining and operating railroads, including the equipment thereof, constructed pursuant to the provisions of Chapter 4 of the Laws of 1891, as amended, and has heretofore entered into a contract and lease (hereinafter termed the Subway Contract) with the City of New York to contribute toward the cost of construction of and to equip, operate and maintain rapid transit, railroads owned or to be owned by the City, and also so as to reconstruct and add to the railroads and property
2783 of the Consolidated Company as to adapt them for operation in connection with said City owned rapid transit railroads. On information and belief that contemporaneously with the execution of the Subway Contract the Public Service Commission for the First District of the State of New York issued to the Subway Company and the Subway Company accepted certain certificates for the construction, equipment, maintenance and operation of certain extensions and certain additional tracks, respectively, in conjunction with the railroads and properties of the Consolidated Company as in the Subway
2784 Contract and in said certificates more particularly specified and described.

THIRTEENTH.—On information and belief that for the purpose of providing funds for the construciton, equipment, operation and maintenance of said rapid transit railroads under the Subway Contract and for the purpose of enabling the Subway Company to carry out and perform said contract, the Subway Company duly authorized and created an issue of its First Mortgage Five Per Cent. Sinking Fund Gold Bonds of which $60,000,000 face amount were issued and sold to the Transit Company at

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97 per cent. of the face amount thereof and accrued interest, and the Subway Company received from the Transit Company the purchase price of said bonds; the amount so received by the Transit Company having been realized by the Transit Company from the sale of $60,000,000 face amount of its Six Year Five Per Cent. Secured Gold Notes due July 1, 1918, secured in part by the pledge of said First Mortgage Five Per Cent. Sinking Fund Gold Bonds of the Subway Company.

FOURTEENTH.—On information and belief that 2786
the Consolidated Company was duly organized under the laws of the State of New York as a consolidation of the Brooklyn Union Elevated Railroad Company, Sea Beach Railway Company and Canarsie Railroad Company and has outstanding $16,000,000 face amount of bonds of said Brooklyn Union Elevated Railroad Company; $7,000,000 face amount of bonds of Kings County Elevated Railroad Company (predecessor of said Brooklyn Union Elevated Railroad Company); and $650,000 face amount of bonds of said Sea Beach Railway Company; payment of the principal and interest 2787
of all of which said bonds has been assumed by the Consolidated Company.

FIFTEENTH.—On information and belief, that the Consolidated Company acquired and is still the owner of all the outstanding stock of the Subway Company; and that under date of January 31, 1913, a certain contract known as the Operating Contract was entered into by and between the Subway Company and the Consolidated Company, providing that the Subway Company should have the right and it thereby agreed during the term specified

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in the Operating Contract to maintain and operate the railroads and properties of the Consolidated Company as therein, and in the Subway Contract described, such maintenance and operation to be either, of said railroads and property separately or in accordance with and as provided in the Subway Contract. In and by the Operating Contract it was provided among other things as follows:

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The Subway Company shall be responsible for and shall pay and discharge any and all debts and obligations incurred by the Subway Company during its possession and operation of the Railroads and Properties and in that regard, including the expenses of operating the Railroads and Properties and conducting the business thereof, and the cost of all repairs, maintenance, renewals, replacements and alterations, as far as the same are fairly chargeable to operating expenses, and also the compensation for the services of its agents and employes. The Subway Company shall likewise, during such possession and operation, pay all interest earned during said interval and due upon the Underlying Bonds, although the same may be either extended or renewed, and upon any and all bonds issued by the Consolidated Company to pay, refund or take up any Underlying Bonds. The Subway Company shall not, in any event, be liable to pay or be responsible for the payment of the principal of said Underlying Bonds when they become due, whether they be extended or renewed, or of any bonds the Consolidated Company shall issue to refund or repay the same.

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The Subway Company, during such posses-

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sion and operation of the Railroads and Properties, shall pay and discharge all taxes and assessments and other governmental or municipal charges levied on the Railroads and Properties, as and when the same become due and payable, but with the right to contest by proper proceedings at law or in equity the validity or legality of the same or any part thereof. The Subway Company will not, during such period of possession and operation, permit or suffer any waste of the Railroads and Properties and will keep and maintain the same in 2792
the order and condition required in and by the Subway Contract.

The Subway Company will account for and pay over to the Consolidated Company, as compensation for the possession and operation of the Railroads and Properties during such possession and operation under this agreement, any and all surplus moneys (over and above an amount equivalent to six per cent. per annum on the par value of capital stock of the Subway Company issued and outstanding from time to time) remaining to the 2793
Subway Company after payment of interest charges earned on the Underlying Bonds, interest and sinking fund charges earned on bonds of the Subway Company, and after any and all other payments under the provisions of the Subway Contract and the Certificates and of this agreement, or either of such instruments, as well as any and all payments made by the Subway Company, with or without the consent of the Consolidated Company, to discharge the lawful debts or obligations of the Consolidated Company, and to protect and pre-

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serve unimpaired the rights and privileges conferred by this agreement. All payments to be made to the Consolidated Company under the provisions of this article shall be made, on or before the 30th day of January, April, July and October in each year.

SIXTEENTH.—On information and belief that thereafter and under date of March 25, 1913, a certain agreement of assignment and lease was entered into by and between the Subway Company
2795 and the Consolidated Company wherein and whereby it was provided among other things that unless and until said assignment and lease should be terminated as therein provided, the Operating Contract and each and every provision thereof should be suspended. On information and belief that in and by said assignment and lease the Subway Company assigned to the Consolidated Company the rights and obligations of the Subway Company under the Subway Contract with respect to the maintenance and operation of the rapid transit railroads owned and to be owned by the City of
2796 New York in conjunction with the railroads and properties of the Consolidated Company and the Subway Company leased to the Consolidated Company the franchises, railroads and properties acquired or to be acquired by the Subway Company under the certificates for the construction, equipment, operation and maintenance of additional tracks to and extensions of the railroads and properties of the Consolidated Company. On information and belief that in and by said assignment and lease the Subway Company reserved to itself the rights and obligations under the Subway Contract to contribute to the cost of construction of and to

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equip the rapid transit railroads owned or to be owned by the City and to reconstruct and add to the railroads and properties of the Consolidated Company so as to adapt them for operation in conjunction with said rapid transit railroads; and also reserved to itself the rights and obligations under said certificates for additional tracks and for extensions respectively to construct and equip the additional tracks to and extensions of the railroads and properties of the Consolidated Company. On information and belief that as required by the terms and provisions of said assignment and lease the 2798
Consolidated Company guaranteed the payment of the principal and interest of the bonds of the Subway Company hereinbefore referred to and also guaranteed the payment of the sinking fund provided for in the mortgage securing said bonds, and the Consolidated Company executed and delivered to the trustee under said mortgage of the Subway Company a mortgage and deed of trust covering all the railroads and properties of the Consolidated Company to secure said guaranties.

SEVENTEENTH.—On information and belief that 2799
the Subway Company duly proceeded with the construction and with the provision of equipment and with the expenditures called for, by the Subway Contract and by the certificates hereinbefore referred to and has now completed the greater part of said construction and equipment and has contributed toward the cost of construction of the City-owned rapid transit lines all or practically all of the amounts required by the Subway Contract.

On information and belief that at the time when the Subway Contract was entered into between the Subway Company and the City of New York it was

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estimated that the amount received by the Subway Company from the sale of its $60,000,000 face amount of First Mortgage Bonds as herein set forth, would be sufficient to enable the Subway Company to complete and provide the initial construction and equipment called for under the terms of the Subway Contract and of the certificates hereinbefore referred to; but that owing to delays beyond the control of the Subway Company and to the great increase in the cost of labor, materials, supplies and equipment since the date of the execu-
2801 tion of the Subway Contract, the cost of the work called for by said contract and said certificates has largely exceeded the estimates as to the amount of the cost thereof, and that it is now estimated that a further sum of at least $11,000,000 will be required for the completion of such construction and equipment; that the Subway Company has now expended substantially all of the proceeds derived by it from the sale of said $60,000,000 face amount of its First Mortgage Bonds, and is now without funds adequate or sufficient to enable it to complete the programme of construction and equipment
2802 required of it by the Subway Contract and by said certificates, and is also without funds sufficient for the payment of obligations and indebtedness incurred by the Subway Company in the course of such construction and equipment and now due or shortly to become due under contracts heretofore let [illegible] for construction and for the provision of equipment, the amount of such obligations and indebtedness of the Subway Company so now due or shortly to become due being in excess of $4,200,000.

EIGHTEENTH.—On information and belief, that the Transit Company has an outstanding funded indebtedness of $70,305,000.00 made up as follows:

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First Refunding Mortgage Convertible 100 Year Gold Mortgage Bonds due July 1, 2002, interest payable January 1 and July 1.....	$5,570,000
50 Year Gold First Mortgage 5% Bonds due October 1, 1945, interest payable April 1 and October 1.....	7,000,000
6 Year 5% Gold Notes due July 1, 1918, interest payable January 1 and July 1.....	580,000
3 Year 7% Gold Notes due July 1, 1921, interest payable January 1 and July 1.....	57,155,000
Total.....	$70,305,000

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and that the Transit Company has also an outstanding floating indebtedness of upwards of $4,850,000.00 for money borrowed from, and for materials and supplies furnished by, various persons, firms and corporations, all of which floating indebtedness is either now or will shortly be due and payable.

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NINETEENTH.—On information and belief that default was made by the Transit Company in the payment of the principal of its Six Year 5% Gold Notes due July 1, 1918, and that said default still continues; and that an installment of interest amounting to $2,000,425 will become due and payable on January 1, 1919, on the Three Year 7% Gold Notes of the Transit Company. On information and belief that the Transit Company is without means to pay said installment of interest due January 1, 1919, and that default will be made by the Transit Company on said date in the payment of the installment of interest then due on said notes.

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On information and belief that said Three Year 7% Gold Notes of the Transit Company are secured in part by the pledge with the trustee of the trust agreement securing said notes of $57,735,000 face amount of the First Mortgage Bonds of the Subway Company hereinbefore referred to, the interest and sinking fund upon the outstanding $60,000,000 face amount of bonds of said issue, amounting to upwards of $1,500,000, will become due and payable on January 1, 1919; that the Subway Company is without means to pay said installment of
2807 interest and sinking fund due January 1, 1919, and that default will be made by the Subway Company on said date in the payment of the installment of interest and sinking fund then due on said bonds.

On information and belief that the Consolidated Company as guarantor of the bonds of the Subway Company is also without means to pay the creditors and to the general public and the City of New York that the railroad system of the Consolidated Company and of the Subway Company should be continued to be operated as a whole, that said system should be preserved, and that the construction and
2808 equipment of said system should be wholly completed and placed in operation as one system as provided for in the Subway Contract and in the certificates hereinbefore referred to.

On information and belief that a large part of the system of rapid transit railroads required by the Subway Contract to be constructed by the City of New York and to be equipped by the Subway Company has already been constructed and equipped; that the railroads and properties of the Consolidated Company have in large part been reconstructed and added to as provided for in the Subway Contract; that the extensions of, and in

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large part the additional tracks to the railroads of the Consolidated Company have been constructed and equipped; that the rapid transit lines of the City, to the extent now constructed and equipped, have been placed in operation and are now being operated by the Consolidated Company in conjunction with the railroads and properties of the Consolidated Company as so reconstructed and added to, and in conjunction with the extensions and additional tracks as so constructed and equipped, all as part of one system of rapid transit railroads partially constructed, equipped and placed in operation; and that it is of vital importance to the defendants herein and their respective creditors and to the general public and the City of New York that the construction and equipment of said system of rapid transit railroads should be completed and that the same should be preserved intact and operated as one system and that the railroads and properties of the Consolidated Company should not be cut out of said system through the foreclosure of the underlying mortgages of the Consolidated Company or through proceedings on the part of other creditors of said Company.

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TWENTY-FIRST.—On information and belief that substantially all of the earnings and income of the Transit Company are and have been derived from the companies controlled by the Transit Company as above set forth; that during the last few years the cost of operation of the lines of street surface, elevated and subway railways operated by said controlled companies have largely increased by reason of the increase in the price of labor, materials, supplies and equipment, while the rates of fare which said controlled companies are by law permitted to

2812 charge have not been increased, with the result that the amount of the net earnings and income of the Transit Company and of the companies controlled by it has been decreased and their credit impaired; so that the defendants are now unable to meet their obligations as they mature, or to provide the funds necessary for proper additions, betterments and improvements to their respective properties required to enable the defendants properly to carry on the business of said companies and of the companies controlled by the Transit Com-
2813 pany through stock ownership, either through the borrowing of additional capital or from the earnings and income of their respective properties or otherwise.

TWENTY-SECOND.—On information and belief many of the creditors to whom the defendants are respectively liable are pressing said defendants for immediate payment and that some of said creditors may bring suits in respect of their said claims and may levy execution on the property owned by said defendants respectively and on the materials, sup-
2814 plies and other property of the defendants, respectively on hand and kept by them for the necessary construction, equipment, maintenance and operation of the lines of rapid transit railroad hereinbefore referred to and of the lines of railroad owned or leased and operated by the several companies controlled by the Transit Company through stock ownership; and that there is grave danger that the lines of said several companies can no longer be operated under a unified control, but that said various lines which are now controlled by the transit Company may be broken up and be separately operated; that there is likewise grave

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danger that suits may be instituted against the defendants in respect of the claims above stated; and that it is essential to the interest of the defendants and their respective creditors and of the public that the property and assets of the defendants should not be sacrificed.

On information and belief that the several companies controlled by the Transit Company as herein set forth are themselves without power-plants, sub-stations and facilities for the generation and supply of the electrical energy necessary for the operation of their respective properties; the same 2816
having heretofore been and now being furnished and supplied by the Transit Company and that unless the Transit Company is permitted through the appointment of a receiver or receivers to continue the operation of said power-plants, sub-stations and facilities, it will be impossible for it to continue the operation thereof or to continue the supply of electrical energy necessary for the continued operation of the lines of railroad of said controlled companies, and said several controlled companies will no longer be able to operate their said lines of railroad or to transport passengers 2817
over the same.

TWENTY-THIRD.—On information and belief that the only means whereby the defendants can meet their respective obligations and pay their respective floating indebtedness and discharge their respective current obligations is by the continued maintenance and operation of the lines of street surface, elevated and subway railways now owned or leased and operated by the Subway Company, the Consolidated Company and the several companies controlled by the Transit Company under one

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unified control as at present; that any suits upon or process against their respective properties and revenues would seriously embarrass and cripple them, and diminish, if not destroy, their power successfully to continue their respective business; that the lines of street surface, elevated and subway railways operated by the several companies controlled by the Transit Company are so numerous and extensive as to constitute a large part of the rapid transit railroad system in the City of New York and practically the entire street surface sys-
2819 tem in the County of Kings and a large part of the street surface railroads in the County of Queens; that during the calendar year 1918 said systems of street surface and rapid transit railroads carried about 771,000,000 passengers; and the average number of persons employed by the Transit Company and by its various controlled and allied corporations, including the Subway Company and the Consolidated Company, exceeds 12,000, and that it is of vital importance to the people of the City of New York that said systems of street surface and rapid transit railroads should be preserved intact
2820 and that the operation thereof should be continued under a unified control; that notwithstanding that every effort has been made to provide funds for the payment of the indebtedness and obligations of the several defendants or for the extension of the time of payment thereof, and for the completion of equipment required by the Subway Contract and by the certificates hereinbefore referred to, such efforts have proved unsuccessful; that unless some definite action is taken on behalf of all the creditors so that the operation of the said systems of street surface and rapid transit railways may be

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kept intact, great and severe loss will be inflicted on all the creditors and security holders of the several defendants and great and irreparable loss will result to the several defendants and to the general public.

TWENTY-FOURTH.—On information and belief, unless the Court, in view of the facts above set forth, shall take the property and assets of the defendants into judicial custody for the protection of every interest therein, that immediately individual creditors will assert their rights and remedies in 2822
different courts; that the result will be a multiplicity of suits and a race of diligence; that attempts will be made to secure judgments and priorities; that levies will be made upon the materials and supplies indispensible to the operation, maintenance, construction and equipment of said lines of street surface and rapid transit railroads, and upon the power plants, sub-stations and facilities employed by the Transit Company in the furnishing of electrical energy to said lines of railroad will greatly interfere with and ultimately prevent the Subway Company and the Consolidated 2823
Company and the other Companies controlled by the Transit Company from the performance of their duties as common carriers, and that it will thus become impossible to continue the operation of the lines of said several companies to the serious inconvenience of the public and a most important and valuable property dismembered, which might be preserved by adequate judicial protection by this Court.

On information and belief, that an attempt by the plaintiff to enforce its claims as a general creditor would precipitate similar action on the part

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of other creditors and would in turn lead to wasteful strife and controversy, which plaintiff believes can be avoided, and the property preserved for equitable distribution among those entitled thereto only by the intervention of a court of equity; and the granting of equitable relief, including the appointment of a receiver.

In consideration whereof, and inasmuch as plaintiff has no adequate remedy at law and can have relief only in equity, plaintiff files this bill of complaint on behalf of itself and of all creditors
2825 of the several defendants who may come in and contribute to the expense hereof, and prays for equitable relief, as follows:

1. That the rights of the plaintiff and of all creditors of the several defendants may be ascertained and decreed, that the Court will fully administer the fund in which the plaintiff is interested, constituting the entire property and assets of the several defendants and ascertain the several and respective liens and priorities existing thereon, and enforce and decree the rights, liens and equities of
2826 the creditors of the several defendants, as the same may be finally ascertained and decreed by the Court.

2. That for the purpose of preserving intact the property and assets of the several defendants a receiver or receivers may be appointed of each of the defendants and of all their respective properties and assets, real, personal and mixed, of whatsoever kind and description and wheresoever situated, with full power to sue for, collect, receive and take into his or their possession goods, chattels, rights, credits, moneys, effects, lands, tenements, books,

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papers, property and assets of every description of the defendants respectively, and with all the incidental powers ordinarily vested in receivers in like cases, and with full power and authority to operate the property and assets of the several defendants, and to collect and receive all the rents, issues and profits thereof, and to apply said rents, issues and profits under the orders or decrees of this Court for such period as the Court shall order, to protect and preserve the corporate franchises, privileges and property, and to preserve the corporate existence of the several defendants and to protect and 2828
preserve the property and assets of the several defendants from being sacrificed under any proceedings which can or may be taken, liable to prejudice or sacrifice the same, and to do any and all acts and things which may be necessary to preserve valuable rights and franchises of the several defendants or otherwise requisite or proper.

3. That at such times as may be found just and proper the properties of the several defendants may be ordered to be sold in whole or in part, in such manner and upon such terms and conditions as this 2829
Court shall deem just and equitable, and that any such order of sale shall make proper and suitable provision for the preservation of all equities, rights, priorities, claims and liens of the creditors of the respective defendants, and shall provide for the sale of the property and assets of said companies, subject to or free and clear from any and all liens or encumbrances, in whole or in part, in such manner and upon such terms as this Court may direct, and that the proceeds of any such sale be distributed among those entitled thereto, as this Court shall adjudicate, or that the properties of

2830 said several defendants may be returned to them, and that the plaintiff may have such other, further and different relief in the premises as to this Court may seem proper and as may be necessary fully to protect and enforce the rights and equities of the plaintiff, and of all the creditors and stockholders of the several defendants and each of them.

4. That temporarily and pending this suit, an injunction may issue against the defendants and all
2831 persons claiming and acting by, through or under them, or any of them, to restrain them from interfering with said receiver or receivers taking possession of said property and assets and that the plaintiff may have such other or further relief in the premises as the nature of the case may require and as may be agreeble to equity.

5. That the defendants be required to answer all and singular the matters above stated, but not under oath, answer under oath being hereby expressly waived.

2832 6. That a writ of subpoena may be granted to the plaintiff to be directed to the several defendants, Brooklyn Rapid Transit Company, New York Municipal Railway Corporation and New York Consolidated Railroad Company, thereby requiring said defendants and each of them personally to be and appear on a certain day before the Court and then and there full, true, direct and perfect answer make to all and singular the premises, but not under oath, answer under oath being hereby expressly waived, and further to perform and abide by such further order, direction or decree therefor, as to the Court shall seem meet.

WALTER F. TAYLOR,
Solicitor for Plaintiff.

2833

State of New York,
County of New York,
Southern District of New York, } ss.:

GUY E. TRIPP, being duly sworn, deposes and says that he is an officer, to wit, chairman of the Board, WESTINGHOUSE ELECTRIC AND MANUFACTURING COMPANY, the plaintiff herein; that he has read the foregoing Complaint and knows the contents thereof, that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information 2834
and belief, and that as to those matters he believes it to be true.

GUY E. TRIPP.

Sworn to before me this
31 day of December, 1918.

LOUIS H. REUTER,
Notary Public, New York County.
N. Y. Co.'s Clerk's No. 228.
N. Y. Co. Register's No. 10,206.

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(Endorsed)

In the District Court of the U. S.—For the Southern District of New York—Westinghouse Electric and Manufacturing Company,—Plaintiff,—against—Brooklyn Rapid Transit Company,—New York Municipal Railway—Corporation, and New York—Consolidated Railroad Company,—Defendants.—Bill of Complaint—Walter F. Taylor—Solicitor—for—plaintiff—54 Wall Street,—Borough of Manhattan—New York City,—Filed December 31, 1918, at 6.40 P. M.—J. M. M.—D. J.

2836 **Government's Exhibit 35—Answer.**

IN THE

DISTRICT COURT OF THE UNITED STATES,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

WESTINGHOUSE ELECTRIC AND MANUFACTURING COMPANY, Plaintiff, against BROOKLYN RAPID TRANSIT COMPANY, NEW YORK MUNICIPAL RAILWAY CORPORATION and NEW YORK CONSOLIDATED RAILROAD COMPANY, Defendants.	In Equity E 15-347.

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BROOKLYN RAPID TRANSIT COMPANY, NEW YORK MUNICIPAL RAILWAY CORPORATION and NEW YORK CONSOLIDATED
2838 RAILROAD COMPANY, defendants herein, hereby file their joint and several answer to the bill of complaint herein, or unto so much and such parts thereof, as said defendants are advised it is necessary or material for said defendants to make answer to and answering say:

FIRST.—The defendants admit all the allegations of said bill of complaint.

SECOND.—The defendants and each of them reiterating the admissions of the preceding Article First of this answer, join in the prayer of said bill

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of complaint and pray that this Court sitting in equity may take possession of the property and assets of each of said defendants through the appointment of a receiver or receivers as prayed in said bill of complaint, and thereby preserve the system of street surface and rapid transit lines of railroad controlled by the defendant, Brooklyn Rapid Transit Company, and thereby protect and preserve the corporate franchises, privileges, property and assets and preserve the corporate existence of the several defendants, and protect and preserve said systems of street surface and rapid transit 2840
railroads, and the property, real and personal of each of said defendants from being sacrificed under any proceedings which can or may be taken likely to prejudice or sacrifice the same, and do any and all acts which may be necessary to preserve the valuable rights, franchises, property and assets of the respective defendants; and the several defendants accordingly pray that inasmuch as there is no adequate remedy at law in the premises for the plaintiff or for said defendants, this Court will, for the purposes aforesaid, appoint a receiver or receivers as prayed for in said complaint, and em- 2841
power and authorize such receiver or receivers to take possession of the entire property and assets of each of said defendants and to preserve, manage, operate and control the same, pay all indebtedness due or to become due by said defendants respectively, and otherwise discharge all the duties ordinarily imposed by courts upon receivers in similar cases; that on the final hearing in this cause this Court will, under said bill of complaint and this answer, or under such supplemental bill as may be filed herein, make such decree or decrees with respect to the property of each of said defendants

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as shall deal with the same on general equitable principles, that this Court will cause all the liens upon the property and assets of said respective defendants, or upon any part of said property and assets, and all rights and claims in equity of persons interested therein to be ascertained, defined and determined, and that the proceeds arising from the sale of said property and assets or any part thereof be applied under the orders or decrees of this Court according to the rights, interests and equities of the parties interested, and that this
2843 Court will direct all persons in possession of the property and assets of the respective defendants, or any part thereof, to surrender the same to such receiver or receivers or to hold such property and assets as such receiver or receivers may direct.

GEORGE D. YEOMANS,
Solicitor for
Brooklyn Rapid Transit Co., New York Municipal Railways Corporation and New York Consolidated Railroad Company, defendants,
Office and P. O. Address,
2844
85 Clinton Street,
Brooklyn, New York.

State of New York,
County of New York,
Southern District of New York, } ss.:

T. S. WILLIAMS, being duly sworn, deposes and says that he is an officer, to wit, President of BROOKLYN RAPID TRANSIT COMPANY, one

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of the defendants herein; that he had read the foregoing answer and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

T. S. WILLIAMS.

Sworn to before me this
31 day of December, 1918.

2846

JOHN A. DONOHUE, JR.,
Notary Public,
Kings County.
Kings Co. Clk. 6, Kings Co. Reg. 103.
New York Co. Clk. 14.
New York Co. Reg. 10010.
Queens County Clk. 992.
Commission expires March 30, 1920.

2847

State of New York,
County of New York,
Southern District of New York, } ss.:

C. D. MENEELY, being duly sworn, deposes and says that he is an officer, to wit, Vice-President of New York Consolidated Railroad Company, one of the defendants herein; that he has read the foregoing answer and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated to be alleged on in-

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formation and belief, and that as to those matters he believes it to be true

C. D. MENEELY.

Sworn to before me this
31 day of December, 1918.

JOHN A. DONOHUE, JR.,
Notary Public,
Kings County.

2849 Kings Co. Clk. 6, Kings Co. Reg. 103.
New York Co. Clk. 14.
New York Co. Reg. 10010.
Queens Co. Clk. 992.
Commission expires March 30, 1920.

(ENDORSED)—In the District Court of the U. S.—For the Southern Dist. of N. Y.—Westinghouse Electric and Manufacturing Company, plaintiff, against Brooklyn Rapid Transit Company, New York Municipal Railway Corporation and New York Consolidated Railroad
2850 Company, defendants.—Answer.—George D. Yeomans, Solicitor for defts.—Office and Post Office Address, 85 Clinton Street, Brooklyn, N. Y. City.—Filed December 31, 1918, at 6:40 P. M.—J. M. M., D. J.

Government's Exhibit 36—Order Appointing Receiver. 2851

IN THE

DISTRICT COURT OF THE UNITED STATES,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

WESTINGHOUSE ELECTRIC AND MANUFACTURING COMPANY, Plaintiff, against BROOKLYN RAPID TRANSIT COMPANY, NEW YORK MUNICIPAL RAILWAY CORPORATION and NEW YORK CONSOLIDATED RAILROAD COMPANY, Defendants.	In Equity, E 15-347.

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This cause came on to be heard at this term on the bill of complaint and the answer of the defendants hereto filed December 31, 1918, and thereupon, upon consideration thereof, the Court being fully advised in the premises, finds, adjudges and decrees as follows: Lindley M. Garrison is hereby appointed temporary receiver of the defendants Brooklyn Rapid Transit Company, New York Municipal Railway Corporation and New York Consolidated Railroad Company, and of all the property and assets of said several defendants, real, personal and mixed of whatsoever kind and description, and wheresoever situated, including all power-houses, power plants and sub-stations owned, 2853

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leased or operated by the defendant Brooklyn Rapid Transit Company, and all railroads owned, leased or operated by the defendants New York Municipal Railway Corporation and New York Consolidated Railroad Company or either of them, all tracks, terminal facilities, offices, shops and all buildings and appurtenances of every kind, all cars and other rolling stock and equipment, tools, machinery, furniture, fixtures, materials and supplies, books of account, records and other books, papers and accounts, cash in bank, on deposit and

2855 in hand, money, debts, things in action, credits, stocks, bonds, evidences of indebtedness, securities, deeds, leases, contracts, muniments of title, bills receivable, rents, issues, profits and income accruing and to accrue as well as all interest, easements, privileges and franchises, and all assets of every kind, character and description of each of the defendants herein. Said receiver is hereby authorized immediately to take possession of and to run, manage and operate the said properties and assets of the several defendants herein in such manner as will in the judgment of said receiver pro-

2856 duce most satisfactory results so that the operation of the system of street surface and rapid transit lines controlled by the defendant Brooklyn Rapid Transit Company shall be continued and the public duties obligatory upon the respective defendants be in all respects discharged, and to exercise the authority and franchises of the respective defendants and discharge their public duties and preserve and protect the properties and assets of said several defendants in proper condition and repair, and to protect the title and possession and to secure and develop the business of the same, and in the discretion of said receiver to employ and dis-

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charge and fix the compensation of all officers, attorneys, managers, superintendents, agents and employees, and to make such payments and disbursements as may be needful and proper in so doing. Said receiver is hereby authorized to collect and receive the rents, income, tolls and profits of the properties and assets of the defendants and each of them and to make appropriate payments therefrom on account of accruing rents and other necessary charges, and said receiver shall have power to redeem any and all securities of the several defendants now pledged as security on loans of money 2858
and shall have power to borrow money if needful in his judgment in order to comply with this direction, and also, so far as may be necessary, to meet current requirements for labor, materials and supplies, and for the other purposes in this order expressly authorized, but for no other purpose without the further order of this Court; and said receiver is hereby fully authorized and empowered to institute and prosecute all such suits as may be necessary in his judgment for the proper protection of the property and trusts hereby reposed in him, and likewise to defend all actions insti- 2859
tuted against him as receiver and also to appear in and conduct the prosecution or defense of any suits now pending in any Court against the defendants or any of them, the prosecution and defense of which will in the judgment of said receiver be necessary for the proper protection of the property placed in his charge or the interests and rights of creditors connected therewith; and said receiver is hereby authorized in his discretion from time to time out of the funds coming into his hands to pay the expenses of operating said properties and executing his trusts and all taxes and assessments

2860 upon said properties or any part thereof, and all such rentals and installments as may fall or become due for the use of any portion of any of said properties; and also to pay and discharge all claims arising from the previous operation of said properties as in his judgment on examination are proper to be paid as expenses of operation and the current and unpaid payrolls and vouchers and supply accounts incurred in the operation of said property at any time within four months prior hereto. Said receiver is hereby required to open books of ac-
2861 count wherein shall be stated separately the earnings, expenses, receipts and disbursements in respect of the property of each of the defendants herein, and shall preserve proper vouchers for all payments made by said receiver.

The bond of said receiver in the sum of One Hundred Thousand Dollars conditioned that he will well and truly perform the duties of his office and duly account for all moneys or property which may come into his hands and abide by and perform all things which he shall be directed to do by this Court with sufficient sureties to be approved by
2862 a judge of this Court shall be forthwith filed in the office of the clerk of this Court.

Each of the defendants and all persons claiming and acting by, through or under them, or any of them, are hereby required and commanded forthwith upon demand of said receiver, or of his duly authorized agent, to turn over and deliver to said receiver, or his duly authorized agent, any and all books of account, vouchers, papers, deeds, leases, contracts, bills, notes, accounts, moneys, or other property in his hands, or under his control, and each of said directors, officers, agents and employees is hereby commanded and required to obey and

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perform such orders as may be given to them from time to time by said receiver or his duly authorized agent, in conducting the operation of the properties and assets of the respective defendants and in discharging his duties as receiver.

The defendants Brooklyn Rapid Transit Company, New York Municipal Railway Corporation and New York Consolidated Railroad Company and each of them, and their and each of their officers, directors, agents and employees, and all other persons claiming to act by, through or under said defendants, or any of them, are hereby enjoined 2864
from interfering in any way whatever with the possession or management of any part of the property over which the receiver is hereby appointed or interfering in any way to prevent the discharge of his duties or his operation of said property, and any party in interest may apply for further direction;

IT IS FURTHER ORDERED that the parties hereto shew cause before this Court at Federal Building, Room 235, in the City of New York, on the 15th day of January, 1919, at eleven o'clock, in the forenoon, why said receivership should not 2865
be continued during the pendency of this suit, and upon the hearing thereon any other creditor of any of the defendants or any party in interest may be heard.

Dated, New York, December 31, 1918.

JULIUS M. MAYER,
U. S. District Judge.

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(Endorsed)

In the District Court of the U. S.—For the Southern District of—New York—Westinghouse Electric Manufacturing Company—Plaintiff—against—Brooklyn Rapid Transit Company,—New York Municipal Railway—Corporation and New York Consolidated Railroad Company,—Defendants.—Order appointing Receiver—Walter F. Taylor—Solicitor—for—Plaintiff—54 Wall Street,—Borough of Manhattan,—New York City. Filed December 31—1918 at 6.40 P. M.—J. M. M.—D. J.

2867

Government's Exhibit 38—Petition of Public Service Commission.

IN THE
DISTRICT COURT OF THE UNITED STATES,
FOR THE SOUTHERN DISTRICT OF NEW YORK.

2868

WESTINGHOUSE ELECTRIC AND MANUFACTURING COMPANY, Plaintiff, against BROOKLYN RAPID TRANSIT COMPANY, NEW YORK MUNICIPAL RAILWAY CORPORATION and NEW YORK CONSOLIDATED RAILROAD COMPANY, Defendants.	In Equity, E15-347.

Sirs:

You will please take notice, that upon the petition of the Public Service Commission for the First

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District, in the name and behalf of The City of New York, verified the 11th day of January, 1919; upon the bill of complaint of the Westinghouse Electric & Manufacturing Company, the plaintiff herein, verified the 31st day of December, 1918; upon the answer of the defendant companies thereto, likewise verified the 31st day of December, 1918; upon the order appointing a temporary receiver herein, entered by this Court on the 31st day of December, 1918, and upon all of the papers and proceedings had in this suit, the undersigned will move this Court, at Room Number 235 in the 2870
Federal Building, on the 15th day of January, 1919, at 11 o'clock in the forenoon or as soon thereafter as counsel may be heard, that the Public Service Commission for the First District acting in the name and behalf of The City of New York, be permitted to intervene and be heard in this suit, and that any further order made in this suit shall grant equitable relief along the lines more particularly set forth in the prayer for relief of the petition annexed hereto.

New York City, January 11, 1919.

2871

GODFREY GOLDMARK,
Solicitor for the Petitioner
the Public Service Commission for the First District.

WILLIAM L. RANSOM,
Of Counsel for the Petitioner.

To

WALTER F. TAYLOR,
Solicitor for the Plaintiff.

GEORGE S. YEOMANS,
Solicitor for the Defendants.

2872

IN THE

DISTRICT COURT OF THE UNITED STATES,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

WESTINGHOUSE ELECTRIC AND MANUFACTURING COMPANY,
Plaintiff,
against

2873 BROOKLYN RAPID TRANSIT COMPANY, NEW YORK MUNICIPAL RAILWAY CORPORATION and NEW YORK CONSOLIDATED RAILROAD COMPANY,
Defendants.

In Equity, 15-347.

TO THE HONORABLE THE JUDGES OF THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK:

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The Public Service Commission for the First District of the State of New York, a public body existing under and by virtue of the Laws of the State of New York and vested thereby with certain powers and duties hereinafter more particularly set forth, files this its petition, in the name and behalf of The City of New York, for leave to intervene and be heard in the above-entitled cause in equity, and for other and further relief as hereinafter more fully prayed; and thereupon and in behalf of the application hereby made and the petitioner's claim of the interest of The City of New

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York in the litigation, the said Public Service Commission for the First District of the State of New York alleges as follows:

FIRST.—That the City of New York is, and at all the times hereinafter mentioned was, a domestic municipal corporation, organized and existing under and by virtue of its ancient charters and the Laws of the State of New York, and is, and at all the times hereinafter mentioned was, a city of more than one million inhabitants; and is, and at all the times hereinafter mentioned was, authorized and 2876
empowered to act, contract, sue and make applications to court, by and through such officers, boards and agents as may be provided by the Laws of the State of New York.

SECOND.—That the petitioner, the Public Service Commission for the First District of the State of New York (hereinafter referred to as "The Commission" or as the petitioner) is a public body existing under and by virtue of the laws of the State of New York and vested thereby with certain powers and duties, particularly those set forth in 2877
Chapter 48 of the Consolidated Laws of the State of New York, commonly known and hereinafter referred to as "The Public Service Commissions Law," and those set forth in Chapter 4 of the Laws of 1891, as amended, commonly known and hereinafter referred to as "The Rapid Transit Act."

THIRD.—That heretofore, on or about the 19th day of March, 1913, under and in pursuance of the Rapid Transit Act, The City of New York, acting by and through the petitioner, but with the approval and consent of the Board of Estimate and Ap-

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portionment of The City of New York, entered into a contract (commonly known and hereinafter referred to as "Contract No. 4") with the New York Municipal Railway Corporation (hereinafter referred to as the "Municipal Railway Corporation") for certain new rapid transit railroads, in and by which contract it was provided and agreed, among other things:

(1) That the City of New York would construct, provide and lease, and the defendant Municipal
2879 Railway Corporation would equip, operate and maintain, certain rapid transit railroads, as in said Contract No. 4 more particularly described, together with all stations and real estate or interests therein belonging to or used in connection therewith and all appurtenances thereto and all other property provided therefor and actually used in connection therewith, including trackage rights, tracks, terminals, storage yards and shops, which said rapid transit railroad, appurtenances and facilities are referred to and defined in the said Contract No. 4 and are sometimes hereinafter referred
2880 to, as "the Railroad";

(2) That the defendant Municipal Railway Corporation would contribute towards the cost of the construction of the said rapid transit railroads an amount not exceeding $13,500,000, and in addition thereto the cost of the construction of the physical connection between what were known as sub-divisions I and II of the Broadway-Fourth Avenue Line at Canal Street and Broadway in the Borough of Manhattan, City of New York;

(3) That in addition to equipping the rapid transit railroads and its contribution aforesaid

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towards the cost of construction thereof, the defendant Municipal Railway Corporation would, as in the said Contract No. 4 provided, so reconstruct and add to the railroads and equipment thereof belonging to the defendant New York Consolidated Railroad Company (hereinafter referred to as "the Consolidated Railroad Company") as in all respects to adopt them for operation in connection with the Railroad, which said railroads and the equipment thereof are in the said Contract No. 4 more particularly described, and are in the said Contract defined and sometimes hereinafter referred 2882
to as the "Existing Railroads";

(4) That the defendant Municipal Railway Corporation would operate and maintain the said Railroad, as so constructed and equipped, and the said Existing Railroads as so reconstructed and added to, each in conjunction with the other, as one system for a single fare. The petitioner herewith refers to the said Contract No. 4 for a full and complete statement of the provisions, terms and conditions thereof, and it is respectfully requested by the petitioner that such reference have 2883
the same force and effect as if the said Contract No. 4 were hereto annexed and fully embodied herein.

(5) That the title of the Equipment when and as provided and delivered on the Railroad and accepted by your petitioner shall vest in The City of New York free from all liens and encumbrances except those imposed pursuant to the said contract. That on the same day on which the said Contract No. 4 was entered into, your petitioner granted to the defendant Municipal Railway Corporation two

2884 certificates pursuant to the said Rapid Transit Act, to wit:

(a) A certificate for certain extensions to elevated lines of the defendant Consolidated Railroad Company and the operation of such extensions by the defendant Municipal Railway Corporation, with a provision for payment of compensation for the rights therein granted, as in the said certificate is more particularly set forth.

2885 (b) A certificate authorizing the construction of additional or third tracks upon certain of the existing lines of the defendant Consolidated Railroad Company and the operation thereof by the defendant Municipal Railway Corporation, with a provision for payment of compensation for the rights granted, as in the said certificate is more particularly set forth.

FOURTH.—That heretofore, on or about the 26th day of March, 1913, the defendant Municipal Railway Corporation, by an agreement bearing that date, duly assigned to the defendant Consolidated
2886 Railroad Company so much of the said Contract No. 4 and of the said certificate as provided for the right and obligation to operate and maintain the Railroad and the Existing Railroads aforesaid, which in and by the said Contract No. 4 the defendant Municipal Railway Corporation had the right and was under the obligation to maintain and operate as therein provided, and all rights with respect to such maintenance and operation or included in the leasing provisions of the said Contract No. 4, subject to all the terms and conditions in the said contract contained with respect to such mainten-

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ance and operation; that the said assignment was duly made and effected and the agreement therefor was duly executed and delivered, pursuant to the provisions of the said Contract No. 4 and by and with the approval and consent of the City of New York, acting by the petitioner, and of the said Commission, duly given and granted; and that, by virtue of the said assignments and of the said consents thereto, the defendant Consolidated Railroad Company then and there acquired and became possessed of, and has at all times since owned and possessed, and now owns and possesses, all and singular the 2888
rights and obligations under the said Contract No. 4 with respect to the maintenance and operation of the Railroad and Existing Railroads as therein provided. The petitioner herewith refers to the said agreement and assignments and the consents thereto, for a full and complete statement of the provisions, terms and conditions thereof, and it is respectfully requested by the petitioner that such reference have the same force and effect as if the said agreement and assignment and to the consents thereto were hereto annexed and fully embodied herein.

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FIFTH.—That by Article XLVIII of the Contract No. 4, it is provided with reference to the lease of the Railroad to the Municipal Railway Corporation (referred to in the said Contract as "the Lessee") for operation in conjunction with the Existing Railroads, as follows:

> "The City hereby leases the Railroad and Equipment to the Lessee for operation in conjunction with the Existing Railroads for a single fare. The lease shall be for a term

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beginning on the first day of January, 1917, and expiring at midnight on the thirty-first day of December, 1965; subject, however, to earlier termination as hereinafter provided. Provided, however, that if the completion of the construction of Subdivisions I and II of the Broadway-Fourth Avenue Line to a condition susceptible of operation shall, by reason of strikes, injunctions or other causes beyond the control of the Lessee, be delayed beyond the first day of January, 1917, the Lessee, if

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not instigating such strikes, or if not instigating or being responsible for such suits for injunctions or such other causes of delay, shall be entitled to an extension of time for the commencement and the expiration of the lease equal to the period between the first day of January, 1917, and the date when such subdivisions of the Railroad are actually ready for operation."

SIXTH.—That as rental for the use of the Rapid Transit Railroads agreed in and by the said

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Contract No. 4 to be constructed and leased by the City of New York, it is provided in Article XLIX of the said Contract, as follows:

"In consideration of the operation of the Railroad and the Existing Railroads in conjunction with each other for a single fare and of the contribution by the Lessee to or toward the cost of construction of the Railroad as aforesaid, upon the commencement of operation of Subdivisions I and II of the Broadway-Fourth Avenue Line, the gross receipts from whatever source derived directly or indirectly

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by the Lessee or on its behalf in any manner from out of or in connection with the operation of the Railroad and the Existing Railroads (hereinafter referred to as the 'revenue') shall be combined during the term of this contract and the City shall receive for the use of the Railroad at the intervals provided a specified part or proportion of the income, earnings and profits of the Railroad and the Existing Railroads."

2894 That it is provided in and by Article XLIX of said Contract that the amount of such income, earnings and profits are to be determined by deducting from the revenue, at the intervals therein prescribed the following deductions, therein more particularly set forth, in the order named, namely, such rentals for the use of property in connection with the Railroad and the Existing Railroads as are not included in operating expenses; taxes and other Governmental charges; operating expenses; twelve (12%) per cent. per annum of the revenue for maintenance exclusive of depreciation; three (3%) per cent. of the revenue for the first year of 2895 temporary operation for depreciation and thereafter an annual deduction for depreciation to be agreed upon between the Commission and the Lessee as prescribed by Paragraph 5 of Article XLIX; three million, five hundred thousand ($3,500,000) dollars per annum to be retained by the Lessee as representing the average annual income from the operation of the Existing Railroads during two years prior to the date of the beginning of the initial operation as defined in said Contract; six (6%) per cent. per annum upon the cost made or incurred by the defendant, Municipal Railway Corporation, for

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construction and equipment pursuant to said Contract No. 4 and the two separate certificates for additional tracks and for elevated railroad extensions therein referred to; actual interest and sinking fund upon the cost to the defendant, Municipal Railway Corporation, for additional equipment as defined in said contract provided by said defendant subsequent to the beginning of initial operation as therein defined; actual interest and sinking fund payable by The City of New York upon the cost to the City of construction for initial operation, as
2897 determined in accordance with the provisions of the said contract; interest and sinking fund actually payable by The City of New York, upon the cost to the said City of the construction of additions to the Railroad as the words "Additions" is in said contract defined; and one (1%) per cent. of the revenue as a contingent reserve fund until such time as such fund with additions and accretions thereon shall equal one (1%) per cent. of the cost of construction and the cost of equipment of the Railroad or the portions thereof remaining in operation. That the amount remaining after making
2898 all such deductions shall be deemed to be the income, earnings and profits of the Railroad and the Existing Railroads.

That it is further provided by Article L of the said Contract No. 4 as follows:

> "Of the income, earnings and profits of the Railroad and the Existing Railroads fifty (50%) per centum shall be paid to the City and the remaining fifty (50%) per centum shall be retained by the Lessee,"

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and by Article LI of the said Contract as follows:

> "If in any quarter year the revenue shall be insufficient to meet the various obligations and deductions referred to in Article XLIX, the deficits shall be cumulative and payments of such deficits shall be thereafter made in full before deducting the amounts required in the paragraph of such article, succeeding the paragraph providing for the payment of the obligations or deductions as to which there has been such deficit."

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That while Subdivisions I and II of the Broadway-Fourth Avenue Line, hereinbefore referred to, have not been completed, it is provided in Article LII of the said Contract No. 4 as follows:

> "Article LII. When and as the Commission shall declare parts of the Railroad to be ready for equipment the Lessee shall forthwith equip the same and when declared by the Commission to be ready for operation the Lessee shall forthwith commence the operation of such part or parts in connection with the Existing Railroads, including such part or parts of the extensions and additional tracks authorized by said certificates as may have been completed and may be ready for operation. The earnings of such part or parts shall be combined with those of the Existing Railroads and the revenue shall be distributed as provided in Articles XLIX, L and LI, except that the deductions provided for in paragraphs 7 and 9 of Article XLIX, shall be computed on the basis of the cost of construction and the cost of

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2902 equipment of such part or parts of the Railroad and such part or parts of the plant and property of the extension and additional tracks authorized by said certificates, and such part or parts of the Reconstruction of the Existing Railroads for Initial Operation as are placed in operation and except further that any deficit in the payments required to be made to the City instead of being cumulative shall be added to the cost of construction of the Railroad."

2903 That on August 1, 1913, a portion of the Railroad constructed under said Contract No. 4 was declared by your petitioner ready for operation on August 3, 1913, and since the latter date the earnings of the elevated or Existing Railroads and of the portions of the Railroad thereafter from time to time constructed have been pooled and the receipts disposed of as provided in said contract.

SEVENTH.—That in and by Section nine, Subdivision one of the Rapid Transit Act, an exception to the power generally vested in the Corporation
2904 Counsel of the City of New York to institute actions and proceedings and make necessary applications, in the name and in behalf of the City of New York, to maintain the rights and interests of The City of New York, is specifically created or recognized in the case of rights, claims and interests arising out of or by reason of the Rapid Transit Act, contracts made in pursuance thereof (such as Contract No. 4), and analogous affairs in that, in and as to such cases, the power is conferred upon the petitioner, the Public Service Commission for the First District, the said provisions of the Rapid Transit Act being as follows:

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"1. The said commission may rent such offices and employ such engineers, attorneys and other persons, from time to time, as it may, in its discretion, deem necessary to the proper performance by it of its duties as in this act prescribed. It may sue in the name and behalf of the City for which it acts as a commission. It may in the name of and in behalf of the said city bring action of specific performance or may apply by mandamus to compel the performance within said city by any corporation or person of any duty or obligation with reference to or arising out of the construction or operation of any railroad under, or by reason of, any grant made or right acquired under this act or the acts amendatory hereof or supplementary hereto, or out of or by reason of any contract made or authorized by any board or rapid transit railroad commissioners within its city or the public service commission, or it may in behalf of and in the name of said city bring actions to recover damages for any violation of contract or duty, or for any wrong committed by any such corporation or person by reason of any non-performance or violation of duty under the provisions of this act or under any contract or stipulation made in pursuance of any provisions of this act."

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Provision that the Commission "may sue in the name and behalf of the City" in this class of actions has been held by the State Courts to be equivalent to a provision that such an action or proceeding in the City's behalf must be brought by the Commission (*Hagadorn* vs. *Raux*, 72 N. Y., 583). Section 255 of the Greater New York Charter provides:

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"Sec. 255. There shall be a law department of The City of New York, the head whereof shall be called the corporation counsel, who shall be the attorney and counsel for The City of New York, the mayor, the board of aldermen and each and every officer, board and department of said city, except as otherwise hereby provided. The salary of the corporation counsel shall be fifteen thousand dollars a year. The corporation counsel shall have charge and conduct of all the law business of the corporation and its departments and boards, and of all law business in which The City of New York is interested, except as otherwise herein provided * * *."

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Section 45 of the Greater New York Charter provides:

"Sec. 45. Nothing in this act contained shall repeal or affect in any manner the provisions of the rapid transit acts applicable to the corporation heretofore known as the mayor, aldermen and commonalty of The City of New York, or any municipality united therewith or territory embraced therein * * *."

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That the foregoing statements of this paragraph are not made for the purpose of challenging or resisting in this proceeding any desire or claim of right on the part of the Mayor, the Comptroller, or other officer of The City of New York, to appear, intervene or be heard in this suit, in behalf of similar or other relief than that herein asked for, but for the purpose of making it clear to this Court that by and through this petition and application, there is before this Court a duly authorized applica-

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tion, by the statutory representative of The City of New York as to rapid transit matters, for the relief hereinafter asked. That the petitioner does not desire to be understood as here interposing any objection to the appearance and representation of The City of New York herein also by and through any other officials whom this Court may in its discretion permit to be heard.

EIGHTH.—That in the opinion of the petitioner, The City of New York is the party and corporation most vitally and heavily interested in this suit, 2912
the pending receivership, and the railroad properties formerly operated by the defendant companies and now by the temporary receiver. That in a very real and vital sense The City of New York is the principal creditor of the defendant companies and the party principally interested in the operations, revenues and expenditures of the defendant companies. That the total outlay and expenditure of The City of New York, under and pursuant to Contract No. 4, in and about the construction of the railroad properties being operated by the receiver, is already in excess of $110,000,000, and that 2913
the revenues and receipts from operation, under Contract No. 4, have thus far fallen at least $10,000,000 below and short of the expenses of operation, even aside from disputed items which the defendant company has been compelled by the petitioner to put in "suspense account," pending the outcome of the arbitration proceedings elsewhere referred to herein. That by reason of this financial interest of The City of New York, in that the said municipal corporation owns more of the property being operated by the temporary receiver than do the defendant companies, and in that the

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said municipal corporation possesses potentially the largest single claim against the future earnings of the defendant Consolidated Railroad Company, the petitioner feels that it would be both proper and advantageous that a co-receiver be selected and appointed, in especial recognition of the rights and interests of The City of New York as set forth in this petition.

NINTH.—That the said Contract No. 4 provides, in Article LVIII thereof, as follows:

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> "The Lessee covenants to and with the City that it will, during the term hereof, operate the Railroad and the Existing Railroads carefully and skillfully, according to the highest standards of railway operation, and with due regard to the safety of the passengers and employees thereof and of all other persons."

The said Contract No. 4 also provides, in Article LIX thereof, as follows:

> "The Lessee shall operate the Railroad and
2916 the Existing Railroads as one complete system and shall furnish with respect thereto such service and facilities as shall be safe and adequate and in all respects just and reasonable."

Upon information and belief, that the above quoted and other covenants of Contract No. 4 have not been performed and fulfilled by the defendant Municipal Railway Corporation and by the defendant Consolidated Railroad Company, and that the petitioner has been advised by its Counsel that the said defendant companies are now in default under

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the said Contract and the assignments thereof, and that the City of New York, acting by and through the petitioner, is now entitled to proceed to enforce against the said defendant companies the right and remedies of the said City under the covenants of the said Contract. That the matter of the said contracts, and of the rights and remedies of the said City and of the defendant companies thereunder, is now in litigation in the courts of the State of New York, and the petitioner has under consideration the question as to what other and further steps should be taken by it to enforce and preserve the 2918
rights and remedies of The City of New York in and as to these properties and in and under the said Contract No. 4. That the pendency of these controversies and their importance to the finances, rights and interests of The City of New York, make important the representation of the said City's rights and interests in the conduct of the pending receivership.

TENTH.—That in and by the said Contract No. 4 it is provided, as hereinbefore more particularly set out, that the Railroad and the Existing Railroads 2919
shall be operated as a unified system for a single fare. That the "single fare" now in force upon the system of the defendant companies is a fare of five cents for a continuous trip, and that such rate of fare may not be increased by the defendant companies without the consent and approval of The City of New York acting by and through the Commission, and also the consent of the Board of Estimate and Apportionment of the City of New York. That the bill of complaint herein, particularly Paragraph "Twenty-first" thereof, is deemed by the petitioner to disclose a belief and contention upon

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the part of the complainant that the rate of fare now in force under Contract No. 4 is inadequate under existing conditions and that the Court, or the receiver under its directions, should and will be called upon to deal with such single fare and the present rate. That with respect to the fare provisions of a contract analagous to Contract No. 4, the Court of Appeals of the State of New York has recently declared (Matter of International Ry. Co. vs. Rann, 224 N. Y., 83), that

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> "Few rights of property are of more immediate concern to a greater proportion of the population than the right to ride on the street cars for a small sum."

That the same Court has also ruled, in the same case, as to the property right of the municipality under and with respect to an agreement for a low, single rate of fare, as follows:

> "Is the provision in the Milburn agreement for a five-cent fare a right of the City of Buffalo? That which is directed by law for
2922 one's protection and advantage is said to be one's right. The rate of fare provision of the Milburn agreement unquestionably secures valuable rights to the inhabitants of Buffalo which they did not previously possess. The city owing or assuming to owe to its inhabitants, the patrons of the street railroad companies, the duty of obtaining more favorable rates, entered into an agreement for their benefit which they may enforce. * * *"
>
> "The agreement confers rights upon the City of Buffalo. The city may terminate it for non-

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performance or it may release the railroad companies from performance or consent to modify its terms, or it may compel performance by suit (Wash. Co. Water Co. vs. Hagerstown, 116 Md., 497). The city is the real party to the agreement. * * *"

"The right of the inhabitants of the City of Buffalo to ride on the street railroad for a five-cent fare is a property right; a right enforcible in the courts, not depending upon another's courtesy or forbearance. By the use of 'a convenient fiction' (People vs. North River S. R. 2924
Co., 121 N. Y., 582, 622), it may be plausibly pressed that such rights are not the rights of the City of Buffalo, but if we look at the substance of things we must conclude that the common rights of the inhabitants of the city, secured through the agency of the city officials, are rights of the city and that the resolutions of the council thus modifying the Milburn agreement through the same agency come peculiarly within the description of resolutions 'disposing of rights of the City.' They make an end to the present five-cent fare and add 2925
twenty per cent. to the burdens of the traveler. Few rights of property are of more immediate concern to a greater proportion of the population than the right to ride on the street cars for a small sum."

ELEVENTH.—That as bearing further upon the question whether the Honorable Lindley M. Garrison, the temporary receiver named by this Court, should be continued as sole receiver during the pendency of this suit, or whether a co-receiver may not preferably be named, the better to secure and

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assure representation of the public rights and interests of The City of New York in the properties, as well as the interests, views and contentions of the defendant companies, your petitioner makes reference to the fact that, pursuant to the provisions of Articles XXIX, XXX and XXVII of the said Contract No. 4, an arbitration is pending and is about to be had between The City of New York, acting by your petitioner, and the Consolidated Railroad Company, concerning the rightfulness of the claim of the Consolidated Railroad Company
2927 that it is entitled to charge to operating expenses under the said Contract No. 4, and so in effect against The City of New York and its prospects of earning even interest upon its large investment in the properties being operated by the defendant companies, the expenses of settling, paying or defending more than $2,000,000 of claims against the defendant companies, arising out of a certain wreck on the lines of the defendant Consolidated Railroad Company on November 1, 1918, commonly known as the Malbone Street tunnel disaster, on account of which five officers of the defendant companies
2928 are under indictment by the Grand Jury of Kings County, on charges involving derelictions of duty and lack of care as officers of the defendant companies. That the Consolidated Railroad Company and the defendant companies have asserted and claimed a right to charge all of these damages and expenses in such a way that the same would fall upon monies otherwise payable to The City of New York as interest upon its investment. That to maintain this assertion, claim and contention on the part of the defendant companies, and to resist, and if possible, to overcome, the contrary contentions of the City of New York acting by your

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petitioner, the defendant companies have brought about an arbitration of the said matter, pursuant to the said provisions of the said Contract No. 4. That before the said thirty-first day of December, 1918, but within that month, the board of arbitrators had been selected and was about to begin its sessions, to determine whether The City of New York or the defendant companies should be sustained in their respective contentions. That as its member of and representative in the said board of arbitrators, your petitioner had named the Honorable Louis Marshall; that as its member of and 2930
representative in the said board of arbitrators to pass upon the claims and contentions of the City of New York, the defendant Consolidated Railroad Company had named the Honorable Lindley M. Garrison, now the sole temporary receiver herein; and the Commission and the Company having been unable to agree upon a third or neutral arbitrator, the Honorable Charles E. Hughes had been named as such arbitrator by the Chief Judge of the Court of Appeals of the State of New York. That in the pending arbitration, the Honorable Lindley M. Garrison, by an instrument duly signed 2931
and executed by him and filed with your petitioner, prior to the said 31st day of December, 1918, had agreed to act as the arbitrator appointed by the defendant Consolidated Railroad Company in this matter. That as temporary receiver of the defendant companies, he will now be obliged to name a company representative, to serve in his place and stead in the board of arbitrators, in determining whether the company may charge against the City of New York these damages and expenses undeniably caused by the negligence of the defendant companies, or some of them; and the said defend-

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ant companies have advised your petitioner that the matter of the selection of a successor to the Honorable Lindley M. Garrison as the arbitrator named by the companies is now in the hands of, and will shortly be determined by, the Honorable Lindley M. Garrison as the sole temporary receiver appointed by this Court.

That the receiver or receivers of the defendant companies will also soon be called upon to decide whether they will continue and prosecute an action brought by the defendant Consolidated Railroad
2933 Company and the defendant Municipal Railway Corporation, on or about the tenth day of December, 1918, against the City of New York and the members of the Public Service Commission for the First District, at that time in office, relative to various matters which will have to be dealt with by the receiver or receivers. That the said action was instituted by these two defendant companies, by and through their attorney at that time, who now is still their attorney and is also, by the direction of the said temporary receiver, still acting with reference to various matters within the scope of the
2934 present receivership, as shown by the order entered herein on the 31st day of December, 1918. That a decision concerning what shall be done as to this action and its subject-matter will soon have to be reached by the receiver or receivers, and important interests of the City of New York depend thereon, no less than do the interests of the material-men and of the defendant companies. That your petitioner believes that the foregoing facts tend further to demonstrate the propriety of the appointment as a co-receiver of some person who has not heretofore represented or been designated to represent the defendant companies or any of

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them adversely to the City of New York, as to any matters which will have to be dealt with by and during the receivership.

TWELFTH.—Upon information and belief, that although the temporary receiver appointed by this Court on the 31st day of December, 1918, has, under the decree of this Court, assumed possession, control and operation of more property belonging to The City of New York than he has of property belonging to the defendants the Brooklyn Rapid Transit Company, the New York Municipal Railway Corporation and the New York Consolidated Railroad Company, and although The City of New York is in reality and in the ultimate accounting the largest single creditor of these defendants and the interests of the plaintiff and all other known creditors of the defendants are in comparison infinitesimal, the said temporary receiver has, in the opinion of your petitioner, failed to take such steps or pursue such a course as would indicate and establish a purpose on his part to act in behalf of, and to recognize and conserve, the rights and interests of The City of New York, rather than merely or primarily the interests of the plaintiff and other material-men and similar minor creditors, and the interests of the defendant companies, by whose admissions, consent, and request the said decree of the 31st day of December, 1918, was entered herein and the said temporary receiver thereby appointed. That on the first day of January, 1919, the day following the appointment of the said receiver, your petitioner, the Public Service Commission of the State of New York for the First District, duly advised and apprised the said temporary receiver, through the intermediary of an as-

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sistant counsel of the said defendant companies, designated and retained by the said temporary receiver to act with respect to company matters as heretofore, that your petitioner would be glad to have a conference with the temporary receiver, at the earliest practicable moment, to discuss matters of importance to the public and to The City of New York, relative to the affairs and properties of the defendant companies and the service rendered upon the lines being administered by and through the temporary receivership. That on Jan-

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uary 3, 1919, in pursuance thereof, the temporary receiver advised the Commission by letter that he hoped to have such a conference "in the near future." That subsequently and on or about the 6th day of January, 1919, your petitioner, by and through its Secretary, informed and advised the said temporary receiver, in writing, in substance, that the members of your petitioner would be glad to have an early opportunity to confer with him concerning matters of importance to the public and of probable utility to the said temporary receiver. That on the 9th day of January, 1919, your petition-

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er by and through its special counsel retained for the purpose of this proceeding, informed and advised the said temporary receiver, in writing, in substance, that if it at any time he desired to confer with the members of your petitioner or with its special counsel, relative to the public interests, properties and rights involved in these proceedings, such special counsel would be pleased to bring about such a conference, to aid the temporary receiver in acting upon full information and adequately representing and protecting the public interests. That no such conference between the said temporary receiver and any members of your peti-

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tioner has been held and nothing has been done by him to that end, beyond an expression, through a letter received by the petitioner on January 10, 1919, of desire or willingness to hold such a conference "so soon as I have acquired sufficient knowledge of the subject matter to make it useful to do so." From what sources the said temporary receiver expects to acquire "sufficient knowledge of the subject-matter to make it useful" for him to consult and confer with the representatives of the public interest and custodians of the expert and disinterested information gathered at public 2942
expense for the use of public authorities, has not been made to appear. Upon information and belief, that not only has the said temporary receiver failed and neglected to hold any conferences with, or obtain and utilize the available information of your petitioner and its expert staffs, maintained at public expense for the particular purpose of making complete scientific and impartial information available to public representatives desiring the same, but also the said temporary receiver has held no conferences with the Mayor, Comptroller or other member of the Board of Estimate and 2943
Apportionment of The City of New York, with respect to the municipal funds and properties, and the public rights and interests so vitally affected by the receivership. That on the contrary, without ascertaining the views and wishes, or obtaining the benefit of the information, of the duly authorized or other representatives of the City of New York, the principal creditor of the defendant companies and the principal investor in the properties being administered by the receivership, the temporary receiver has been in continuous touch and very frequent conference with the officers of and attor-

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neys for the defendant companies; has toured and inspected the system and properties only in the company of officers of the defendant companies whose derelictions are the subject-matter of pending proceedings in the civil and criminal courts; and has employed, retained and continued in the legal work incident to the affairs under his direction the members of the legal department of the defendant companies, whose efforts have lately been, and are, mainly put forth to defend, shield and protect those officers of the defendant com-
2945 panies from the criminal charges for which they have been indicted and are about to be tried. That in a number of unfortunate respects, which your petitioner greatly regrets, the said temporary receiver in pursuance of and in evident reliance upon this interested, biased, prejudiced and prejudicial information and advice, has made and published purported statements of fact and opinion which your petitioner does not believe he would conceivably have made, if he had seasonably conferred with representatives of either the Public Service Commission for the First District or the Board of
2946 Estimate and Apportionment of The City of New York, or if representatives of the public interests had accompanied him upon the tours which he made by way of inspection of receivership properties, in company only of representatives of the defendant companies, whose official acts are under scrutiny in the Courts of the State of New York. Upon information and belief that the said temporary receiver has also publicly announced that, at least for the present, he will make no changes in the personnel of the officials of the defendant companies, whose management and operation of the lines of the defendant companies, and whose at-

titude towards public rights and interests, have been so severely and particularly criticised by your petitioner, by the members of the Board of Estimate and Apportionment of The City of New York, and by Courts of the State of New York, and that he will make no changes in the salaries of these officers, some of which reach figures which may in part account for any inability of the defendant companies to pay to the plaintiff Westinghouse Electric and Manufacturing Company the paltry $40,235.72 owed to it by the Transit Company. Concerning these officials and this management, whose operating tenure as to property built with City money the temporary receiver disclaims any intent to terminate, your petitioner declared, through the adoption by the Commission of a formal opinion submitted by one of its members on November 9, 1918:

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"In course of the memorandum which I filed in this matter three weeks ago, in connection with the denial of the companies' application for a modification of the 250-car Order, I said:

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" 'Do the owners of the companies appreciate that the public is ready to do justice when the company officials have kept the faith and have honestly tried to serve the public? When will the owners realize that in their own interests it may be wise to dispense with a regime rebellious to law and public obligations, and to substitute officials who can recognize the public character of a private enterprise, and who, while striving to make the business a success, can, with a will to please, be frank, honest and above

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board with public officials and the public. There have been notable examples of company officials who have been both successful and popular, and, therefore, assets, rather than liabilities, to their companies and to the public. Such men never pledge lightly the "good faith" of their companies.'"

"That characterization of the official regime which dominates the surface, elevated and subway system in Brooklyn, derives added per-
2951 tinency and force from every revelation of the course pursued by these companies. Resistance to legal mandates, defiance of public obligations, disregard of the comfort and safety of passengers, disruption and overthrow of any kind of public control over their operations, seem to be the dominant motives of the company officials responsible for what has taken place in this case. These companies will no doubt soon be required, by judicial mandate, to comply with the present order, which they have so persistently flouted; but there can be
2952 no real responsiveness of these companies to public needs and no co-operation between the companies and the Commission so long as the affairs of the companies are in the hands of men who have so lightly treated their pledged word and so defiantly disregarded both the Commission's order and their own promises."

THIRTEENTH.—That as appears from the bill of complaint herein, the defendant, Brooklyn Rapid Transit Company, does not own or operate any rapid transit or street surface railroad, but owns all or a controlling interest in the stock of the

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operating companies, and thus controls and directs their finances and affairs, although it is not a railroad or street railroan corporation, and is not as such subject to the jurisdiction of the petitioner, but is in the category of what is commonly termed a "holding company." That the defendant, Brooklyn Rapid Transit Company, does, however, as appears by the bill of complaint herein, own substantial quantities of the equipment, power-houses, repair facilities and the like, necessarily used by the street surface railroad companies referred to in Paragraph "Ninth" of the bill of complaint, and 2954
those companies are thus not only controlled by the defendant, Brooklyn Rapid Transit Company, through stock ownership as aforesaid, but also are altogether dependent upon the defendant "holding company" for equipment, power and upkeep of rolling stock. That in consequence the receiver or receivers appointed by this Court will be in virtual control and direction of the operations and affairs of these street surface railroad companies. That in the opinion of the petitioner, a continuance of this system of nominal or "paper" operating companies, and a "holding company" possessed of all 2955
the real power and authority but responsible to no regulatory control, by the Commission or otherwise, is inimical to good service and the public interests. That it would be exceedingly unfortunate, in the opinion of the petitioner, alike for the public and for the investors in the securities of the defendant companies, if the outcome of this suit and the pending receivership were anything less than such a reorganization of the defendants and their affiliated companies as would bring to an end the evils and abuses from which the public and the investors have alike suffered. That the petitioner accord-

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ingly begs leave to suggest to this Court that these "paper" companies, nominally operating street surface railroads mentioned in Paragraph "Ninth" of the bill of complaint, ought to be brought suitably within the purview of any relief granted under the bill of complaint herein, to the end that any reorganization plan evolved in this proceeding shall be constructive, remedial, comprehensive and adequate, and may bring to an end the transit evils hitherto endured by The City of New York and by its inhabitants within the area supposedly served
2957 by the Brooklyn Rapid Transit Company system. That in the opinion of the petitioner there can be no sound reason for permitting the scope and purview of whatever remedial action is now or hereafter taken herein to be limited by the corporate "shell" interposed by these street surface railroad companies.

FOURTEENTH.—That on the first and the second days of January, 1919, the petitioner caused it to be announced in the public press that upon the 15th day of January, 1919, it would make to this Court the application hereby made. That on the
2958 10th day of January, 1919, the petitioner, through its special counsel in the matter, informally advised and notified the solicitors of record for the plaintiff and the defendants in this suit that this application would be made to this Court on the 15th day of January, 1919, and that the necessary motion papers to that end would be served upon them on or before the 11th day of January, 1919.

FIFTEENTH.—That no previous application has been made by the petitioner to any Court or Judge for any of the relief herein asked for.

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SIXTEENTH.—That the foregoing allegations of this petition are not intended by the petitioner and should not be deemed or construed to be in any respect in criticism or derogation of the appointment of the Honorable Lindley M. Garrison, as temporary receiver, or of his appointment and continuance as one of the receivers during the pendency of this suit, if there be such a continuance of the receivership. That, on the contrary, the petitioner recognizes the excellent executive, personal and professional qualifications of the present temporary receiver to be and continue as one of 2960
the permanent receivers of the properties of the defendant companies. The belief and contention of the petitioner is that, whomsoever may be named a permanent receiver with reference to the matters and interests set forth in the bill of complaint of the Westinghouse Electric and Manufacturing Company, there should be also named a co-receiver in view of and with reference to the large financial interest of The City of New York in properties, operations and finances of the defendant companies, and that the receivership should be continued, if at all, only upon that basis and upon such an 2961
appointment of co-receivers.

SEVENTEENTH.—The petitioner desires also to be granted leave to intervene and be heard in this proceeding, so that it may be in position to aid the Court, the receivers, the creditors of the defendant companies, and all others having an interest in the litigation, in the working out of a reorganization plan which shall be constructive, comprehensive, remedial, adequate for the protection of all public rights and interests, and sufficiently thoroughgoing to ensure the permanent improvement of trans-

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portation service in Brooklyn. As the legally authorized representative of the City and the public, in matters of transportation, your petitioner is a peculiarly necessary party to a proceeding which looks to future reorganization and reconstruction, as well as present debts, and lays hands on the vital elements in the transportation problem and in which the action of this Court will definitely and fundamentally determine the future conditions of transportation on lines so important to the City of New York and to the public.

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IN CONSIDERATION WHEREOF, and for the reasons and in view of the facts and circumstances hereinbefore set out, the petitioner prays that any further Order made in this suit shall grant equitable relief along the following lines, among others:

(1) That if the receivership created by the Order made by this Court on the 31st day of December, 1918, be continued during the pendency of this suit, a co-receiver be also appointed, in view of the large investment of The City of New York in the railroads and equipment being and to be operated under such receivership, the said City's ownership of a large part of such railroad properties and its vital interest in the operation of the said properties, the receipts and expenses thereof, and the future disposition thereof.

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(2) That the said Public Service Commission for the First District acting in the name and behalf of The City of New York, be permitted to intervene and be heard in this suit, and to present for the consideration of this Court and of the receiver or receivers appointed herein such suggestions and

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recommendations as seem to it necessary for the protection of the properties, rights and interests of The City of New York, respecting the operations, affairs and finances of the defendant companies, and respecting the service rendered to the public during the continuance of such receivership and the rates of fare chargeable therefor, and respecting any reorganization plan which may be the outcome of this suit, and respecting the rights and obligations of The City of New York and the defendant companies under and by virtue of the certain contract made and entered into on the 19th day of 2966
March, 1913, between The City of New York, acting by and through the said Public Service Commission for the First District and the defendant, New York Municipal Corporation, commonly known as Contract No. 4; and

(3) That The City of New York and the said Public Service Commission for the First District, have such other and further relief as to this Court, upon this hearing or afterwards, may seem just and proper.

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PUBLIC SERVICE COMMISSION FOR
THE FIRST DISTRICT,
By TRAVIS H. WHITNEY,
Acting Chairman.

GODFREY GOLDMARK,
Solicitor for the Petitioner, the Public Service Commission for the First District.

WILLIAM L. RANSOM,
Of Counsel for the Petitioner.

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State of New York,
County of New York,
Southern District of New York, } ss.:

Travis H. Whitney, being duly sworn, deposes and says that he is a member, and the Acting Chairman of the Public Service Commission for the First District, the petitioner herein; that he has read the foregoing petition and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated to be alleged
2969 upon information and belief, and that as to those matters he believes it to be true.

TRAVIS H. WHITNEY.

Sworn to before me this 11th
day of January, 1919.

WILLIAM G. FULLER,
Notary Public,
New York Co. No. 175.
(Notarial Seal)

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Government's Exhibit 40—Answer to Petition of Public Service Commission. 2971

IN THE

DISTRICT COURT OF THE UNITED STATES,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

WESTINGHOUSE ELECTRIC AND MANUFACTURING COMPANY,
Plaintiff, 2972

against

BROOKLYN RAPID TRANSIT COMPANY, NEW YORK MUNICIPAL RAILWAY CORPORATION and NEW YORK CONSOLIDATED RAILROAD COMPANY,
Defendants.

In Equity
E 15-347.

TO THE HONORABLE THE JUDGES OF THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK: 2973

Brooklyn Rapid Transit Company, New York Municipal Railway Corporation and New York Consolidated Railroad Company, defendants herein, hereby file their joint and several answers to the petition of the Public Service Commission for the First District of the State of New York, assuming to act herein in the name and on behalf of the City of New York, or unto so much and such parts

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of said petition as said defendants are advised it is necessary or material for said defendants to make answer to, and answering say:

I. The defendants admit the allegations contained in paragraphs designated "First," "Third," "Fourth," "Fifth" and "Sixth" of said petition.

II. The defendants deny that they have knowledge or information sufficient to form a belief as to the truth of the allegations contained in para-
2975 graphs designated "SECOND," "SEVENTH," "FOURTEENTH," "FIFTEENTH" and "SIXTEENTH" of said petition, except the defendants admit that on January 10, 1919, William L. Ransom, representing himself as special counsel for the petitioner in this matter, notified the solicitor of record for said defendants that application would be made to this court on January 15, 1919, for leave to intervene and for the appointment of a co-receiver of said defendants and that motion papers to that end would be served on or before January 11, 1919.

2976 III. The defendants deny each and every allegation contained in paragraph designated "EIGHTH" of said complaint except the defendants deny they have knowledge or information sufficient to form a belief as to the truth of the allegation in said paragraph contained that "the petitioner feels that it would be both proper and advantageous that a co-receiver be selected and appointed in especial recognition of the rights and interest of The City of New York as set forth in this petition."

IV. The defendants deny each and every allegation contained in paragraph designated "NINTH"

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of said petition, except the said defendants admit that Articles LVIII and LIX of Contract No. 4, provide in part as in said paragraph set forth, and except the said defendants deny that they have knowledge or information sufficient to form a belief as to the truth of the allegation in said paragraph contained that the petitioner has been advised by its counsel that the defendants New York Municipal Railway Corporation and New York Consolidated Railroad Company are now in default under the contract and assignment referred to in said paragraph "NINTH" and that The City 2978
of New York, acting by and through the petitioner, is now entitled to proceed against said defendants to enforce the rights and remedies of the City under the covenants of said contract and the defendants further deny that they have any knowledge or information sufficient to form a belief as to the truth of the allegation that the "petitioner has under consideration the question as to what other and further steps should be taken by it to enforce and preserve the rights and remedies of The City of New York in and as to these properties and in and under the said Contract No. 4." 2979

V. The defendants admit the allegations contained in paragraph designated "TENTH" of said complaint, that in and by Contract No. 4 it is provided that the Railroad and the Existing Railroads shall be operated as a unified system for a single fare of five cents for a continuous trip, except as otherwise provided in Article LXII of said contract, and that "such rate of fare may not be increased by the defendant companies without the consent and approval of The City of New York,

2980 acting by and through the Commission and also the consent of the Board of Estimate and Apportionment of The City of New York," but the defendants deny knowledge or information sufficient to form a belief as to the truth of each and every other allegation in said paragraph "TENTH" contained.

VI. The defendants admit the allegations contained in paragraph designated "ELEVENTH" of said petition, except that the defendants deny that
2981 the arbitration referred to in said paragraph "ELEVENTH" involves the determination whether the damages and expenses occasioned by the wreck referred to in said paragraph "ELEVENTH" are to be charged against the City of New York, and that these defendants further deny that said damages and expenses were caused by the negligence of said defendants or any of them, and except that these defendants further deny the imputations against the temporary receiver of the defendants and against the attorney for the defendants contained in said paragraph "ELEVENTH,"
2982 and particularly in the sentence of said paragraph reading: "That your petitioner believes that the foregoing facts tend further to demonstrate the propriety of the appointment of a co-receiver of some person who has not heretofore represented or been designated to represent the defendant Companies or any of them adversely to The City of New York, as to any matters which will have to be dealt with by and during the receivership."

VII. The defendants deny the allegations contained in paragraph designated "TWELFTH" of said petition that the temporary receiver appoint-

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ed by this court on December 31, 1918, has, under the decree of this court, assumed possession, control and operation of more property belonging to The City of New York than of property belonging to the said defendants, and deny that The City of New York is a creditor of said defendants or of either of them. The defendants deny that they have any knowledge or information sufficient to form a belief as to the truth of each and every other allegation in said paragraph "TWELFTH" contained, except the defendants are informed that the petitioner requested a conference at the earliest 2984
practicable moment with the temporary receiver appointed by this court and that said temporary receiver expressed a willingness to hold such a conference as soon as he had acquired sufficient knowledge of the subject matter to make such a conference useful, and except the defendants admit that said temporary receiver has retained in performance of their customary duties the officers and employes of said defendants and has consulted with such officers and employes and has inspected the properties of the said defendants with a view to acquiring knowledge of the subject and with a 2985
view to making his reports to this court, and the defendants allege that in view of the temporary nature of the appointment of the receiver and of the short time that has elapsed since his appointment, no other course could properly have been pursued by said receiver.

VIII. The defendants admit the allegations of paragraph designated "THIRTEENTH" of said petition that the defendant Brooklyn Rapid Transit Company does not own or operate any rapid transit or street railway, but owns all or the con-

2986 trolling interest in the stock of the operating companies; that said defendant Brooklyn Rapid Transit Company is not a railroad or street railroad corporation and is not as such, subject to the jurisdiction of the Public Service Commission for the First District of the State of New York; that the defendant Brooklyn Rapid Transit Company does own substantial quantities of the equipment, power houses, repair facilities and the like used by street surface railroad companies referred to in the bill of complaint herein, and that such companies are
2987 dependent upon the defendant Brooklyn Rapid Transit Company for equipment, power and upkeep of rolling stock; and that to such extent the receiver of said defendant Brooklyn Rapid Transit Company appointed by this court will be in control of the operation and affairs of said street surface railroad companies referred to in the bill of complaint herein, and that such companies are dependent upon the defendant Brooklyn Rapid Transit Company for equipment, power and upkeep of rolling stock; and that to such extent the receiver of said defendant Brooklyn Rapid Transit Com-
2988 pany appointed by this court will be in control of the operation and affairs of said street surface railroad companies. On information and belief the defendants deny each and every other allegation in said paragraph "THIRTEENTH" contained.

IX. The defendants deny that they have any knowledge or information sufficient to form a belief as to each and every allegation of the petition herein not otherwise specifically admitted or denied.

The Brooklyn Rapid Transit Company, New York Municipal Railway Corporation and New York Consolidated Railroad Company, defendants

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herein, for further joint and several answers to the petition of the Public Service Commission for the First District for the State of New York herein or unto so much and such parts thereof as said defendants are advised it is necessary or material for said defendants to make answer to, and answering say:

X. That as alleged in paragraph "THIRD" of said petition, The City of New York, acting by and through the petitioner, with the consent and approval of the Board of Estimate and Apportionment of said City, on March 19, 1913, entered into a contract with the defendant, New York Municipal Railway Corporation, commonly known and hereinafter referred to as "Contract No. 4," for new rapid transit railroads, in and by which contract it was provided and agreed, among other things, substantially as set forth in said paragraph "NINTH," and that contemporaneously with the delivery of said contract the petitioner issued to the defendant, New York Municipal Railway Corporation, and said defendant accepted two certain certificates, one for construction, equipment, maintenance and operation of certain extensions of, and the other for the construction, equipment, maintenance and operation of certain additional tracks to, the existing elevated railroads belonging to the defendant, New York Consolidated Railroad Company. For a full and complete statement of the provisions, terms and conditions of Contract No. 4, a copy of said contract is annexed hereto, marked Exhibit A and made a part of this answer as if here set forth at length.

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XI. That as alleged in paragraph "FOURTH" of said petition, the defendant, New York Municipal

2992 Railway Corporation, assigned to the defendant, New York Consolidated Railroad Company, and said defendant thereby became possessed of and has at all times since owned and possessed and now owns and possesses all and singular the rights and obligations of said defendant, New York Municipal Railway Corporation, under said Contract No. 4 and under said Certificate with respect to the operation and maintenance of the Railroad and Existing Railroads and of the extensions and additional tracks therein and in said paragraph
2993 "NINTH" referred to.

XII. That as alleged in paragraph "FIFTH" of said petition, The City of New York in and by Article XLVIII of Contract No. 4 leased to the defendant, New York Municipal Railway Corporation, the Railroad to be constructed by said City and to be equipped and operated by said defendant, as described and provided for in said contract, in conjunction with the Existing Railroads of the defendant, New York Consolidated Railroad Company, reconstructed and added to as provided for in Article XIII of said contract, as one system for
2994 a single fare, for a term to begin on January 1, 1917, or at such later date as the construction of Subdivisions I and II of the Broadway-Fourth Avenue Line described in said contract should be completed by the City to a condition susceptible of operation; that The City of New York has not as yet completed the construction of Subdivisions I and II of said Broadway-Fourth Avenue Line to a condition susceptible of operation, and the terms of said lease has not as yet commenced.

XIII. That as alleged in paragraph "SIXTH" of said petition, Contract No. 4, provides in and

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by Article XLIX and L thereof that The City of New York is to receive, as rental for the use of the rapid transit railroads by it in said contract agreed to be constructed and leased, fifty per centum (50%) of the income, earnings and profits of the Railroad and the Existing Railroads determined by deducting from the gross receipts of such operation, at the intervals therein prescribed and in the order there named, the deductions substantially in said paragraph "SIXTH" and more particularly in Article XLIX of said contract set forth; and that as alleged in paragraph "SIXTH" 2996
of said petition, it is provided in Article LI of said contract that, "if in any quarter year the revenue shall be insufficient to meet the various obligations and deductions referred to in Article XLIX, the deficits shall be cumulative and payments of such deficits shall be thereafter made in full" before deducting the amounts required in the paragraph of said article next succeeding that as to which there has been such deficit.

XIV. That provision is made in and by Article LII of Contract No. 4 for what is commonly re- 2997
ferred to as "temporary operation"; namely, that prior to the commencement of the term of the lease as provided for in Article XLVIII of said contract, and "when and as the Commission shall declare parts of the railroad to be ready for equipment the Lessee shall forthwith equip the same and when declared by the Commission to be ready for operation the Lessee shall forthwith commence the operation of such part or parts in connection with the Existing Railroads, including such part or parts of the extensions and additional tracks as may have been completed and may be ready for

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operation." It is further provided in and by Article LII of said Contract that the "earnings of such part or parts shall be combined with those of the Existing Railroads and the revenue (meaning thereby the gross receipts) shall be distributed as provided in Articles XLIX, L and LI, except that the deductions provided for in paragraphs 7 and 9 of Article XLIX, shall be computed on the basis of the cost of construction and cost of equipment of the parts so placed in operation, and except that any deficits in the payments required to
2999 be made to the City, instead of being cumulative and entitled to payment as provided for in Article LI of said contract, shall be added to the City's cost of construction of the Railroad.

XV. That on August 1, 1913, as alleged in paragraph "SIXTH" of said petition, a part of the Railroad constructed by The City of New York under Contract No. 4 was declared by the petitioner herein to be ready for operation on August 3, 1913; that on August 3, 1913, the defendant, New York Consolidated Railroad Company, as assignee aforesaid of the defendant, New York Municipal Rail-
3000 way Corporation, commenced to operate such part of the Railroad in connection with the Existing Railroads; that from time to time since August 3, 1913, the petitioner herein has declared other parts of the Railroad to be ready for operation and, when so declared to be ready for operation, said defendant, New York Consolidated Railroad Company, has forthwith commenced to operate the same in connection with the Existing Railroads; that on and at all times since August 3, 1913, said defendant, New York Consolidated Railroad Company, has operated such parts of the Railroad in

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connection with the Existing Railroads under what is known as "temporary operation," pursuant to and as provided for in Article LII of Contract No. 4, "initial operation" as therein defined and the term of the lease therein contained not having as yet commenced, due to the failure of the City of New York to construct Subdivisions I and II of the Broadway-Fourth Avenue Line to a condition susceptible of operation as provided for in Article XVVIII of said contract; that as alleged and admitted in paragraph "SIXTH" of said petition, on and at all times since August 3, 1913, the earnings 3002
of the Existing Railroads and of the parts of the Railroad, as well as of the parts of the extensions and additional tracks, from time to time constructed and placed in operation "have been pooled and the receipts disposed of as provided in said contract; on information and belief that all deficits, which have accrued to the City of New York since the commencement of temporary operation on August 3, 1913, have been added by the City to its cost of construction of the Railroad, pursuant to and as provided for in Article LII of said contract; and that neither the petitioner nor The City of 3003
New York, for whom the petitioner assumes to act herein, is a creditor of defendants herein or of either of them under Contract No. 4 or otherwise, nor has the petitioner or The City of New York, any enforceable claim under said contract or otherwise against the defendants or either of them.

XVI. That the defendant, New York Municipal Railway Corporation, has in all respects contributed toward the cost of construction of the Railroad the sum of $13,500,000 pursuant to and in accordance with the provisions of Article XI of Con-

3004 tract No. 4, and said defendant, in addition to contributing said amount, has contributed the cost of construction of the physical connection between Subdivisions I and II of the Broadway-Fourth Avenue Line, pursuant to and as provided for in said Article XI; that said defendant has constructed and equipped and the defendant, New York Consolidated Railroad Company, has placed in operation extensions of and additional tracks to the Existing Railroads, in accordance with the provisions of said certificates, to the extent they
3005 have respectively been authorized and permitted by the petitioner herein so to do; that said defendant, New York Municipal Railway Corporation, has reconstructed and added to the Existing Railroad so as to adapt them for operation in connection with the Railroad, as provided for in Contract No. 4, with the exception of a comparatively small amount of work remaining to be done and now in progress of completion and which the receiver appointed by this court can cause to be completed prior to the time specified in Article XIII of said Contract No. 4 for the completion thereof; that
3006 the defendants, New York Municipal Railway Corporation and New York Consolidated Railroad Company, have duly accounted to the petitioner herein and through it to The City of New York for all receipts and expenditures for and in connection with construction, the provision of equipment, maintenance and operation under Contract No. 4 and said certificates; have duly filed with the petitioner all vouchers, records and reports required in and by said contract and certificates, and have prior to the execution thereof submitted to the petitioner for its approval and has obtained its approval of agreements, undertakings, leases,

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contracts and contract drawings required in and by Contract No. 4 and said Certificates to be submitted to the petitioner herein for its approval; and that said defendants and each of them have performed each and every provision and requirement of said Contract No. 4 and of said certificates on their parts to be performed, except in so far as they have been prevented from performing the same by reason of the failure or neglect of the petitioner and of The City of New York to perform said contract and certificates on their part.

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XVII. That Contract No. 4 and said certificates in and by their provisions furnish and assure to The City of New York full, complete and adequate protection and remedy for any failure, neglect or refusal of the defendants, New York Municipal Railway Corporation and New York Consolidated Railroad Company, or of either of them, or of the receiver herein of said defendants or either of them, to perform the terms, provisions and conditions of said contract and certificates on their parts respectively to be performed, and in support of this allegation the defendants herein make special reference to Articles VI, XIII, XVI, XVII, XXI, XXII, XXIII, XXIV, XXV, XXVI, XXVII, XXVIII, XXIX, XXX, XXXVII, XXXIX, XL, XLV, XLVI and LXXXV of said Contract No. 4; that as the defendants are advised and verily believe, the intervention of the petitioner herein and the appointment of a co-receiver as prayed for, "in especial recognition of the rights and interests of the City of New York," are not necessary for the protection of the rights and interests of said City under Contract No. 4 and said Certificates, but on the contrary that said contract and certificates in

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and of themselves furnish and assure to said City full, complete and adequate protection of any and all rights and remedies it has or may have against the defendants herein or against any receiver of said defendants under said contract and certificates; and that, as the defendants are advised and verily believe, the appointment of a co-receiver herein, "in special recognition of the rights and interests of The City of New York," and especially in view of the allegations contained in paragraph "ELEVENTH" of said petition, in addition to in-

3011 creasing unnecessarily the expenses of the receivership, will give to said City preferential representation in the receivership as against the defendants herein and their creditors and the holders of their securities, and will jeopardize, if not prevent, unity of control and action necessary to preserve intact the properties and assets of the defendants, and necessary for the operation and management of said properties and assets in such manner as will produce most satisfactory results so that the systems of street surface and rapid transit lines of or controlled by the respective defendants shall be con-

3012 tinued and the public duties obligatory upon the respective defendants shall be in all respects discharged, and so that the properties and assets of the defendants shall be protected and preserved in proper condition and repair and the business of the same shall be secured and developed.

IN CONSIDERATION WHEREOF, the defendants herein pray that said petition of the Public Service Commission for the First District of New York, for permission to intervene herein and

for the appointment of a co-receiver, may be denied and that said petition may be dismissed.

GEORGE D. YEOMANS,
Solicitor for the Defendants,
Brooklyn Rapid Transit Company,
New York Municipal Railway
Corporation and New York
Consolidated Railroad Com-
pany,
Office and Post Office Address,
85 Clinton Street,
Borough of Brooklyn,
City of New York.

State of New York, }
County of Kings, } ss.:

T. S. Williams, being duly sworn, deposes and says that he is an officer, to wit: President of Brooklyn Rapid Transit Company, one of the defendants herein; that he has read the foregoing Answer and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

T. S. WILLIAMS.

Sworn to before me this
15th day of January, 1919.

JOHN A. DONOHUE, JR.,
Notary Public,
(Seal) Kings County.
Kings County Clerk 6, Kings Co. Reg. 103.
New York Co. Clerk 14, N. Y. Co. Reg. 10010.
Queens County Clerk 992.
Commission expires March 30, 1920.

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State of New York,
County of Kings, } ss.:

T. S. Williams, being duly sworn, deposes and says that he is an officer, to wit, President of New York Municipal Railway Corporation, one of the defendants herein; that he has read the foregoing Answer and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he
3017 believes it to be true.

T. S. WILLIAMS.

Sworn to before me this
15th day of January, 1919.

JOHN A. DONOHUE, JR.,
Notary Public,
(Seal) Kings County.
Kings County Clerk 6, Kings Co. Reg. 103.
New York Co. Clerk 14, N. Y. Co. Reg. 10010.
Queens County Clerk 992.
3018 Commission expires March 30, 1920.

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State of New York, }
County of Kings, } ss.:

C. D. Meneely, being duly sworn, deposes and says that he is an officer, to wit, Vice-President of New York Consolidated Railroad Company, one of the defendants herein; that he has read the foregoing Answer and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

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C. D. MENEELY.

Sworn to before me this
15th day of January, 1919.

JOHN A. DONOHUE, JR.,
Notary Public,
(Seal) Kings County.
Kings County Clerk 6, Kings Co. Reg. 103.
New York Co. Clerk 14, N. Y. Co. Reg. 10010.
Queens County Clerk 992.
Commission expires March 30, 1920.

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3022 **Government's Exhibit No. 41.**

IN THE

DISTRICT COURT OF THE UNITED STATES,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

WESTINGHOUSE ELECTRIC AND MANUFACTURING COMPANY, Plaintiff, against BROOKLYN RAPID TRANSIT COMPANY, NEW YORK MUNICIPAL RAILWAY CORPORATION and NEW YORK CONSOLIDATED RAILROAD COMPANY, Defendants.	In Equity, E. 15-347. Affidavit of the Corporation Counsel of the City of New York.

County of New York,
Southern District of New York. } ss.:

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3024 William P. Burr, being duly sworn, deposes and says:

That he is the Corporation Counsel of the City of New York. That under the Charter of the City of New York (Section 255) the Corporation Counsel is expressly vested with the power "to institute actions in law or equity, and any proceedings provided by the Code of Civil Procedure or by law in any Court, local, state or national, to maintain, defend and establish the rights, interests, revenues, property, privileges, franchises or demands of the City, or any part or portion thereof, or of the peo-

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ple thereof." That he appears on the return day of the order made the 31st of December, 1918, herein for the purpose of applying on behalf of the City of New York for the appointment of a Co-Receiver herein in pursuance of a Resolution of the Board of Estimate of the City of New York, hereinafter more specifically set forth.

Pursuant to the approval of the Board of Estimate of the City of New York, a contract was made under date of March 19, 1913, between The City of New York and the defendant New York Municipal Railway Corporation, which contract is entitled Contract No. 4, and is one of the two contracts for rapid transit construction and operation generally known as the Dual Contracts. Simultaneously with the making of Contract No. 4 there were also issued, with the approval of the Board of Estimate of the City, by the Public Service Commission for the First District, to the said New York Municipal Railway Corporation, two Certificates, also dated March 19, 1913, one authorizing the extension of the existing railroads, owned or controlled by the defendant New York Municipal Railway Corporation and the defendant New York Consolidated Railroad Company, and the other authorizing the laying of additional tracks on the existing railroads, owned or controlled by the said New York Municipal Railway Corporation or the said New York Consolidated Railroad Company.

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Leave is hereby asked to refer upon the hearing of this application, and upon any further proceedings held thereon, to said Contract No. 4 and to said Certificates, with the same force and effect as though they were set forth in full in this affidavit.

Pursuant to said Contract No. 4 a large part of the new rapid transit railroad as projected by said

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contract has been constructed by the City of New York.

There has been appropriated by the City of New York for the construction of said rapid transit railroad the sum of $124,811,928.60, of which sum $110,695,775.95 has already been expended and contract obligations incurred by the City in the further sum of $14,057,270.24. There has been contributed to construction of these subways about $10,000,000 by the New York Municipal Railway Corporation on account of the amount agreed and

3029 required to be contributed by said Company.

The City of New York is holder of unpaid claims and judgments against the New York Consolidated Railroad Company, the Brooklyn Rapid Transit Company and its subsidiary companies on contract obligations, statutory obligations for paving and percentage of gross receipts, and damages to property in the aggregate sum of $7,645,907.79, as more fully appears from the statement of said claims hereto annexed and marked "Exhibit C."

There is further due and unpaid by the subsidiary companies controlled by the Brooklyn Rapid

3030 Transit Company various taxes, viz.: Real Estate of Corporations Taxes, Special Franchise Taxes, and Assessments for improvements in the aggregate of $1,894,457.49, as more fully appears from the statement hereto annexed and marked "Exhibit B."

These claims are exclusive of the claim of the City of New York against the New York Municipal Railway Corporation for $1,990,800 to which reference is hereinafter made.

The aggregate amount of the claims of the City of New York against the defendants and the subsidiary companies of the Brooklyn Rapid Transit Company is $11,531,165.28.

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The financial interest of the City of New York represented by expenditures actually made for the construction of rapid transit railroad under said Contract No. 4 and by its unpaid claims and judgments against these defendants and the subsidiary companies of the Brooklyn Rapid Transit Company is over $136,284,000.

Temporary operation of such railroad, as thus in part constructed, together with the existing railroads, owned or controlled by the said New York Municipal Railway Corporation or the said New York Consolidated Railroad Company, and to which 3032
extensions have been in part built, and upon which additional tracks have been laid in part in pursuance of the aforesaid Certificates, has been begun pursuant to the provisions of Contract No. 4 by the said New York Municipal Railway Corporation, designated in Contract No. 4 as the Lessee, and by the said New York Consolidated Railroad Company, the assignee of said Lessee.

Disputes and controversies have arisen between the City of New York and these two defendant railroad corporations, both in connection with the amount of contribution agreed to be made by the 3033
New York Municipal Railway Corporation to the construction of said new railroad, and, furthermore, in respect of the inadequate and at times even unsafe service rendered by the New York Municipal Railroad Corporation and the New York Consolidated Railroad Company in their aforesaid temporary operation of said railroads, as far as completed.

Under the provisions of Contract No. 4, the City of New York has entered in contractual relations with the New York Municipal Railway Corporation covering various matters connected with the

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construction and operation of the rapid transit railroad system projected under said Contract and Certificates. Included among these contractual provisions is a covenant upon the part of the City in which it agrees that the Lessee under said Contract may institute suits against the City for various matters arising in respect of the Contract, including the right to bring suit at law or in equity in assertion of a claim for a right of specific performance or otherwise (Contract No. 4, Article XV).

3035 Similarly, by the provisions of Contract No. 4, in the event that the Lessee, viz., the New York Municipal Railway Corporation, should fail to contribute toward the cost of construction, or to equip the railroad, as in the Contract provided, the City is given the right to avail itself of various specific remedies, such as through the agency of the Public Service Commission to declare the Lessee in default and to take advantage of that default in the manner specified in the Contract, and, furthermore, by virtue of Article XVI of Contract No. 4, the City

3036 "may avail itself of each and every remedy herein specifically given to the City, or, subject to the foregoing provisions of this Article, now or hereafter existing at law or in equity or by statute, and, subject as aforesaid, each and every such remedy shall be in addition to every other remedy so specifically given or otherwise so existing, and may be exercised from time to time and as often and in such order as may be deemed expedient by the Commission, and the exercise, or the beginning of the exercise of one remedy shall not be deemed a waiver of the right to exercise, at the same

time or thereafter, any other remedy, except that no two inconsistent remedies shall be exercised at the same time."

Furthermore, in the event of a default by the Lessee, viz., the said New York Municipal Railway Corporation, either in paying the rental provided for in Contract No. 4 or in case of the failure or neglect of the said Lessee faithfully to observe, keep and fulfill any of the conditions, obligations and requirements of the lease, it is provided in Article LXXXV of said Contract that the City may 3038
take advantage of that default through the agency of the Public Service Commission in various particulars specified under subdivisions 1, 2 and 3 of said Article, and in addition thereto it is provided in subdivisions 4, 5 and 6 of said Article

"(4) The City may by the Commission or otherwise, but without suit, enforce by sale or otherwise its lien upon any cash, securities, bonds or securities or surety obligations held as aforesaid. Or,

(5) The City may by the Commission or 3039
otherwise also bring any suit or proceeding for injunction or for specific performance or to recover damages or to obtain any relief or for any purpose proper under this contract.

(6) The City may by the Commission or otherwise avail itself of each and every remedy herein specifically given to the City, and, subject to the foregoing provisions of this Article, every remedy herein specifically given or other remedy now or hereafter existing at

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law or in equity or by statute, and, subject as aforesaid, each of such remedies shall be in addition to every other remedy so given or otherwise so existing and may be exercised from time to time and as often and in such order as may be deemed expedient by the Commission, and the exercise, or the beginning of the exercise, of one remedy shall not be deemed a waiver of the right to exercise, at the same time or thereafter, any other remedy, except that no two inconsistent remedies shall be ex-

3041 ercised at the same time."

Moreover, by the terms of Contract No. 4, and within thirty days after the execution of that Contract, the New York Municipal Railway Corporation was required to file with the Comptroller of the City of New York a bond in due form executed by said Lessee and by two or more sureties in the sum of $1,000,000. Said bond was executed by the New York Municipal Railway Corporation substantially in the form set forth as an appendix to Contract No. 4, whereby the said New York Munici-

3042 pal Railway Corporation is held firmly bound, together with its sureties, jointly and severally, unto the City of New York, in the sum of $1,000,000, the condition of said bond being that the Lessee shall promptly pay the amount of the annual rental specified in said Contract and shall also faithfully perform all the covenants, conditions and requirements specified and provided for in said Contract.

The Public Service Commission for the First District of the City of New York is, by law and by the terms of Contract No. 4, designated as a special agency or instrumentality to represent the City and the State in various particulars covering the

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supervision of construction, and the operation of said rapid transit railroad and existing railroads agreed to be operated in conjunction with said railroad. The Public Service Commission has at various times and in various ways, since such Contract No. 4 was entered into, exercised the jurisdiction vested in it under statute, and under this contract, and has issued various orders and directions to the two aforesaid railroad corporations in respect of their temporary operation under Contract No. 4. Many of the orders and directions of the Public Service Commission, as the deponent 3044
is informed and verily believes, have been partially or wholly disobeyed or disregarded by the said corporations.

As deponent is informed and verily believes, it has been claimed on behalf of the Public Service Commission, that the said New York Municipal Railway Corporation is in default under Contract No. 4. The two said railroad corporations, on the other hand, have publicly stated and alleged that the Public Service Commission has hampered and delayed the said railroad companies in respect of their performance of Contract No. 4. 3045

The matters in dispute between the Public Service Commission and the said railroad companies relating to construction, equipment and operation of the aforesaid railroads have been so frequent and plentiful, and have come so gravely to imperil the City's aforesaid investment of many millions of dollars in this enterprise, as well as the safety and convenience of the traveling public, that the City itself by its duly constituted authorities has for over a year past at times found it necessary directly to take up the defense and protection of the interests of the City and of the people of the City

3046 in respect of this Contract, and the public service contemplated to be performed. The City in this way has had occasion to institute suit and proceedings in court and to investigate the conduct of the Public Service Commission, as well as that of these railroad companies, in relation to their respective duties and obligations under Contract No. 4. A claim has been advanced by Counsel to the Public Service Commission that the said Commission has an exclusive right to represent the City in all matters connected with this Contract, including the
3047 City's investment of many millions thereunder. As Corporation Counsel of The City of New York, I am of the opinion that this claim is without substantial merit.

On January 13, 1919, deponent obtained from the Public Service Commission a copy of the petition of the Public Service Commission, verified January 11, 1919, and a notice of motion dated the same date, being papers which the Public Service Commission propose to submit to this Court on the hearing herein for the continuance of the Receivership on January 15, 1919, as a basis for an appli-
3048 cation of said Commission to be permitted to intervene, and be heard or consulted as to the selection of a Co-Receiver, in view of the large interests of The City of New York in the properties sought to be placed in the custody of the Receiver.

Deponent has read that portion of said petition of the Public Service Commission in which the Commission states that it

> "does not desire to be understood as here interposing any objection to the appearance and representation of The City of New York herein * * *."

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Nevertheless by legal argument, said petition intimates that the Public Service Commission have an *exclusive* capacity and right to appear for and represent The City of New York, in respect of rapid transit matters. This legal contention which, in the opinion of deponent, is invalid as aforementioned, was advanced by the defendant, New York Municipal Railway Corporation, in an action now pending in the Supreme Court of the State of New York, before His Honor, Mr. Justice LEHMAN, and as yet undetermined; and the same contention was at the same time advanced before Mr. Justice LEHMAN, sitting in the same court, in another suit instituted by The City of New York against the Chief Engineer of the Public Service Commission and the Interborough Rapid Transit Company as defendants.

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The truth is that under the Constitution and laws of the State of New York, including the Charter of the City of New York, the City has an inherent right by its own local and duly constituted authorities, to at all times enforce, protect and maintain its rights by suit or otherwise, as may be necessary.

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Further referring to the said petition of the Public Service Commission, deponent asks leave upon the hearing herein, to refer to the various other matters alleged in said petition. Deponent does this not for the purpose of adopting the same, or as agreeing therewith necessarily, but merely as setting forth the views and claims, in fact and law, advanced by the Public Service Commission, which vested with various powers and duties both on behalf of the State and in behalf of the City in re-

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spect to the details of regulation and supervision under the laws of the State of New York and by virtue of the terms of Contract No. 4, is the body of Contract No. 4.

There are now pending in the Supreme Court of the State of New York two suits to which the City of New York is a party, which directly involve Contract No. 4:

1. On or about November, 1916, the City of New York as plaintiff, instituted an action in the Su-
3053 preme Court of the State of New York, against the New York Municipal Railway Corporation and the Public Service Commission and others, defendants, to set aside the allowance by the Chief Engineer to the Commission of the sum of $1,990,800 as a charge against the City, which sum had been allowed on the theory that it could be properly included to make up in part the $13,500,000 agreed to be contributed by the New York Municipal Railway Corporation to the construction of the aforesaid railroad and in part had been allowed as properly chargeable up against the City as part of the said
3054 corporation's capital contribution to cost of construction, equipment, etc. Issue was joined in this action, and in February, 1918, the same came to trial before Mr. Justice LEHMAN, at Special Term, Part IV, of the Supreme Court, and said action was finally submitted on behalf of the plaintiff, the City of New York, on or about January 10th, 1919, and is now pending undetermined before said Court.

2. On or about December 10, 1918, an action was instituted in the Supreme Court, State of New York, by the New York Municipal Railway Corporation and the New York Consolidated Railroad

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Company, plaintiffs, against the City of New York, and the Public Service Commission, defendants, in which suit the said two railroad corporations as plaintiffs seek by decree of specific performance to compel the City of New York to complete certain portions of the said railroad projected in said Contract No. 4 which have not as yet been completed and in which suit other relief is prayed for by said corporations. The City of New York has not yet interposed its answer to this suit. Such answer is, however, now in course of preparation by deponent as Corporation Counsel of the City. This action 3056
may directly involve the question of the proper construction or validity of various provisions of Contract No. 4 and also may and ought directly involve a determination of the question whether or not the said two railroad corporations are in default under Contract No. 4. Deponent begs leave to refer upon the hearing herein to the pleadings, papers and proceedings in said State Court actions.

Under the provisions of Contract No. 4, The City of New York in various ways, in the event of a failure or inability upon the part of the New York 3057
Municipal Railway Corporation to perform its obligations under said Contract, is assured the right to take the possession and operation of the aforesaid railroad, and existing railroads to be operated therewith, out of the hands of the said New York Municipal Railway Corporation, grantee and lessee under said Contract, and to operate the same as agent for said lessee or grantee, and in that connection The City of New York is given and assured the right, at its election, itself to take possession and operation of said railroads, or to enter into a

3058 contract with some other person or corporation to so operate the same. For greater certainty deponent begs leave to refer to Contract No. 4 for the provisions conferring this right upon the City.

The above entitled suit in equity of the Westinghouse Electric and Manufacturing Company, plaintiff, against the Brooklyn Rapid Transit Company, New York Municipal Railway Corporation and New York Consolidated Railroad Company was instituted, and application to this Court for receiver was made, upon the filing of the complaint
3059 and answer by the defendants on December 31, 1918, all without notice to or consultation with The City of New York or any of its officials, and it was only through the newspapers published on January 1, 1919, that deponent and other officials of The City of New York learned of such receivership.

Deponent has since read the complaint and answer herein and the order of this Court appointing Lindley M. Garrison receiver of the defendants. Neither The City of New York nor any of its officials were consulted in respect of the selection or nomination of Mr. Garrison for appointment by
3060 this Court as said receiver.

By reason of the matters herein set forth or referred to, The City of New York has definite contract rights and vital monetary and transportation interests in respect of the question whether the Mr. Garrison or any other individual or individuals should be continued during the pendency of this suit as receiver or receivers of the property of the aforesaid defendant companies, particularly for the reason that the order of this Court of December 31, 1918, appointing said Lindley M. Garrison as temporary receiver aforesaid purports to authorize said receiver:

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"Immediately to take possession of and to run, manage and operate the said properties and assets of the several defendants herein in such manner as will in the judgment of said receiver produce most satisfactory results, so that the operation of the system of street surface and rapid transit lines controlled by the defendant Brooklyn Rapid Transit Company shall be continued and the public duties obligatory upon the respective defendants be in all respects discharged, and to exercise the authority of franchise of the respective defendants and discharge their public duties and preserve and control the properties and assets of said several defendants * * *."

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In addition to the City's interests hereinbefore specified under Contract No. 4, the City and the people of the City, including particularly the people of the Borough of Brooklyn, are vitally interested in regard to the various other elevated and street surface railroad companies which are controlled by stock control or otherwise by the defendant Brooklyn Rapid Transit Company, which is what is known as a "holding company."

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The said company is not itself a railroad corporation, but is merely a business corporation organized under the Business Corporation Law of the State of New York.

There has been increasingly during the past year grave dissatisfaction expressed by the people of the City and by officials of the City itself, as to the control of the public authorities as would be a corporation duly organized as a railroad or public service corporation. In various ways the control

3064 by the defendant Brooklyn Rapid Transit Company of the traction lines which go to make up what is known as its system may have resulted in the furnishing of that inadequate, and, at times, unsafe service to the people of the City, particularly those living in the Borough of Brooklyn, of which complaint has constantly been made as aforesaid.

It is a grave question which the local authorities of The City of New York have had under consideration by reason of the responsibilities devolved upon them by the Constitution and the laws of
3065 the State of New York, as to whether or not the defendant Brooklyn Rapid Transit Company should be aided, either by favorable action upon applications for increases of fare, or by the grant of other measures of relief, in further strengthening or perpetuating the said business corporation's control over this transit system, which it has operated with such poor results and so inadequately, having regard to the welfare and interests of the people of the City. Direct responsibility should be placed on all the Companies actually operating in the streets of the City.

3066 Furthermore, the question whether the New York Municipal Railway Corporation and New York Consolidated Railroad Company may be permitted to continue in possession and operation of the Rapid Transit Railroad and aforesaid Existing Railroads, or should be granted an amendment of the provisions of said Contract, in view of the now admitted financial inability of said company to continue with the performance of its part of said contract, is one which, under the terms of Contract No. 4, rests in the discretion and election of the City of New York and more particularly in the judgment and discretion of the Board of Estimate, as the local legislative body of the City.

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Under the laws of the State of New York and the terms of Contract No. 4, only by an amendment to said contract recommended by the Public Service Commission, and approved by the Board of Estimate and Apportionment, could The City of New York surrender its right (hereinbefore referred to), at any time during the pendency of this suit, to exercise the remedies vested in it under Contract No. 4 in the event of default, including the right to take possession of the aforesaid Rapid Transit Railroad and Existing Railroads out of the hands of the defendant Railway Corporation 3068
or their receiver or receivers appointed by this Court. The responsibility devolves upon the City authorities to decide whether to waive any and all defaults of the said railroad corporations under this contract, and whether to permit the operation of said Railroad and Existing Railroads to be further entrusted to them or their receivers, as lessee or grantee.

The extent of the City's investment in the construction of the Rapid Transit Railroad under Contract No. 4 is set forth in detail in the annexed statement (Exhibit "A") of Duncan MacInnes, 3069
Chief Accountant of the Department of Finance of the City of New York, to deponent dated January 6, 1919.

Besides the moneys already invested by it, the City will have to expend many additional millions of dollars to complete the construction contemplated by Contract No. 4, which will require harmonious action between the City and the Lessee, its receiver or receivers.

The Brooklyn Rapid Transit Company owns or controls the following elevated and street surface

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railroad lines, as defendant is informed by various records and verily believes:

1. *Brooklyn Heights Railroad Co.,* entire capital stock of $200,000 owned by B. R. T.

2. *Brooklyn City Railroad Co.,* leased to Brooklyn Heights Railroad Co. for 999 years from February 14, 1893.

3. *Brooklyn, Queens County and Suburban Railroad Co.,* entire capital stock of $2,000,000 owned by B. R. T.

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4. *Nassau Electric Railroad Co.,* 98 per cent. of entire capital stock owned by B. R. T.

5. *Coney Island and Gravesend Railway Co.,* entire capital stock of $350,000 owned by B. R. T.

6. *Coney Island and Brooklyn Railroad Co.,* $2,637,000 of the $2,983,000 of outstanding capital stock owned by Coney Island and Gravesend Railway Co.

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7. *DeKalb Avenue and North Beach Railroad Company,* entire $10,000, capital stock owned by Coney Island and Brooklyn Railroad Co.

8. *Bridge Operating Company,* $50,000 of $100,000 of capital stock owned by B. R. T.

9. *Transit Development Company,* entire capital stock of $500,000 owned by B. R. T.

10. *South Brooklyn Railway Co.,* entire capital stock of $500,000 owned by B. R. T.

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11. *New York Consolidated Railroad Co.,* over 96 per cent. of outstanding stock owned or controlled by B. R. T.

12. *New York Municipal Railway Corporation,* all outstanding capital stock owned by New York Consolidated Railroad Co.

13. *South Brooklyn Railway Company,* outstanding stock amounting to $500,000 owned by B. R. T.

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14. *Prospect Park and Coney Island Railroad Co.,* leased by South Brooklyn Railway Co. for 999 years from June 7, 1899.

15. *New York and Coney Island Railroad Company,* leased to Prospect Park and Coney Island Railroad Co., $92,500 of the outstanding $100,000 capital stock controlled by B. R. T.

16. *Prospect Park and South Brooklyn Railroad Co.,* leased to Prospect Park and Coney Island Railroad Co., all outstanding capital stock controlled by B. R. T.

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Through its ownership of all or a majority of the capital stocks of said subsidiary companies, the Brooklyn Rapid Transit R. R. Co. (B. R. T.) controls all the elevated lines in the Borough of Brooklyn and all the surface lines, with the exception of a short piece of line operated by the Van Brunt St. Erie Basin R. R. Co. and about ½ mile operated by the Manhattan Bridge 3¢ Fare Line.

In addition to requesting that this Court appoint a Co-Receiver and appoint in such capacity

3076 the Comptroller of the City of New York as recommended by the Resolution of the Board of Estimate, copy of which is hereto annexed, deponent, as Corporation Counsel of the City of New York, hereby begs leave respectfully to submit the following additional suggestion to this Court:

That the Court exact and impose as a term of the said receivership, and as an obligation and stipulation to be accepted and assumed not only by the receiver or receivers herein, but also by the defendant, Brooklyn Rapid Transit Company, as
3077 well as by such subsidiary corporations of the Brooklyn Rapid Transit Company, as to which this receivership may hereafter be extended, that no compulsory free transfer obligations now enforced by virtue of State statute, ordinance, or other valid State authority in respect of the street surface railroad corporations which are controlled by stock control or otherwise by the defendant, Brooklyn Rapid Transit Company, shall be abrogated or suspended merely through the action of said defendant Brooklyn Rapid Transit Company, or said receiver or receivers, in endeavoring to abrogate
3078 leases or other so-called unprofitable contracts, or merely by voluntary action of any of the parties to said leases in termination of the same. By the aforesaid compulsory free transfer obligations, deponent refers to those privileges which are now existing and which enure in favor of the traveling public, enabling them to take a single continuous ride for a five cent fare over various lines of the Brooklyn Rapid Transit System, including those compulsory free transfers now in force by virtue of provisions of State law which were assumed when leases or trackage contracts were made by the aforesaid corporations or any of them or by virtue

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of contracts with the City when franchises were granted. And deponent includes herein and refers particularly to the compulsory free transfer privileges now existing and enuring in favor of passengers arising from the lease made on or about February 4, 1893, for a term of 999 years, by the Brooklyn City Railroad Company to the Brooklyn Heights Railroad Company, both of which companies are controlled by stock control or otherwise by defendant, Brooklyn Rapid Transit Company.

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Deponent does not suggest on behalf of the City that this lease, as it now stands, must necessarily be continued, but on the contrary, it is probable that its various terms, including particularly its high rental provisions, ought to be modified. Deponent respectfully submits, however, that whether or not such lease be further continued or modified, that the existing compulsory free transfers in favor of passengers should be continued, except and until the Public Service Commission under the powers vested in it under existing State law, or else the Legislature itself, may otherwise prescribe or provide. In this connection deponent respectfully refers to Section 65 of the Judicial Code of the United States, which provides:

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> "Whenever in any cause pending in any court of the United States there shall be a receiver or manager in possession of any property, such receiver or manager shall manage and operate such property according to the requirements of the valid laws of the state in which such property shall be situated, in the same manner that the owner or possessor thereof would be bound to do if in possession there

3082 of. Any receiver or manager who shall wilfully violate any provision of this section shall be fined not more than three thousand dollars, or imprisoned not more than one year, or both."

This provision of the Judicial Code, which is a valid enactment of Congress and, therefore, represents the supreme law of the land, has been construed by the Supreme Court of the United States to enjoin upon a receiver or receivers appointed by the Federal Court in their management and
3083 operation of a State railroad property, the due observance not only of statutes of the State, but also of ordinances of local authorities (see *Erb* vs. *Morasch*, 177 U. S., page 584; *U. S.* vs. *Harris*, 177 U. S., page 305). And deponent, as Corporation Counsel of the City of New York, respectfully gives notice that as representing the people of the City of New York, he proposes to hold the receiver or receivers appointed herein to a strict compliance with this Act of Congress, in its application to any matters relating to the attempted abrogation of free transfer privileges or any other matter re-
3084 lating to an attempted raising or changing of the rates of the fares which the said street surface railroad companies, controlled by the Brooklyn Rapid Transit Company, may justly charge under State law. Deponent similarly invokes this Act of Congress in its application to any other laws of the State of New York or ordinances of the duly constituted authorities of the City of New York pertaining to the proper operation and management of the various railroad companies, stock-controlled by the Brooklyn Rapid Transit Company.

Referring to the application being made by the Public Service Commission for the First District

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upon this hearing, deponent as Corporation Counsel of the City submits to this Court the following further suggestion:

Deponent expresses no opinion as to the legal merit or as to the wisdom or propriety of so much of the application of the Public Service Commission for the First District as prays for leave to intervene as a party to this suit. In so far, however, as the Public Service Commission for the First District asks this Court for leave to suggest or nominate a co-Receiver herein, deponent calls the attention of the Court to Section 2, subdivision 7, of the Public Service Commissions Law, which provides:

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> "7. The term 'street railroad corporation,' when used in this chapter, includes every corporation, company association, joint-stock association, partnership and person, their lessees, trustees or *receivers appointed by any court whatsoever*, owning, operating or managing any street railroad or any cars or other equipment used thereon or in connection therewith."

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Since this provision of the statute creating the Public Service Commission and defining its duties, prescribes that its delegated regulatory and supervisory powers and functions shall extend over a receiver appointed by any court (including thereby this Court), quite as fully as over those railroad corporations themselves, deponent respectfully submits that the appointment of a co-Receiver at the suggestion or nomination of, and in any sense as the representative of, the Public Service Commission would be impracticable and improper, since

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it would result in placing the Public Service Commission in an inconsistent position, viz., it would be (a) the public tribunal regulating public service corporations, and (b) indirectly through the co-Receiver that would be nominated by it as aforesaid, in a measure also one of the "street corporations" to be so regulated.

Deponent respectfully submits that by the appointment of a co-Receiver by this Court upon the request and pursuant to the recommendation of the Board of Estimate of the City of New York, this
3089 Court would lay a foundation for a proper and helpful co-operation between the various public authorities of the City of New York and the receivers appointed by this Court in meeting the vital and important problems that will arise in respect of these companies and that are pressing for a solution. This Court, by appointing the co-Receiver recommended by the City, will be taking the step which, in deponent's judgment, will best safeguard against, and prevent, this receivership from being availed of merely by special classes of security holders or creditors, so as to enable them to gain un-
3090 due advantage, through the receivership, for their special property interests, to the real detriment of the public interest. In this way this Court will be observing the maxim laid down by the Supreme Court of the United States in *Joy* vs. *St. Louis*, 138 U. S., 1. 47. where, speaking by Mr. Justice BLATCHFORD, the Court said:

> "Considerations of the interests of the public are held to be controlling upon a court of equity, when a public means of transportation, such as a railroad, comes into the possession and under the dominion of the court."

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Deponent, as Corporation Counsel of the City, in submitting said request and suggestion of the Board of Estimate of the City in respect of the appointment of a co-Receiver, earnestly and respectfully submits that his Court, by acting favorably upon the Board of Estimate's suggestion and request, will pursue a course that will be best calculated to avoid conflict between the various railroad corporations and public officials who are charged with duties and responsibilities or else represent important property interests, in relation to the continued operation and control of the rail- 3092
roads of the City of New York comprehended in the Brooklyn Rapid Transit system, involved directly or indirectly in this suit; and it is the judgment and earnest belief of deponent that this Court, by acting favorably upon this request and suggestion of the Board of Estimate, will be afforded the opportunity to enforce a principle and take a forward-looking step that, more than anything else, will be apt to make for the just and speedy solution of the intolerable transit situation that now confronts the people of the City of New York.

The Public Service Commission is but an agent 3093
or an instrumentality in carrying on the work of construction of the Rapid Transit System. The owners of this Rapid Transit System of railroads are the people of The City of New York who have contributed the vast sums expended in their construction. This is the people's money. This is the people's property. The Mayor and the Board of Estimate represent the people and are responsible to them. Not only that, but the Mayor and the Board of Estimate represent the City, which is the grantor of the franchises heretofore granted to street surface railroads controlled, owned and

3094 operated by the Brooklyn Rapid Transit Company and to whom the obligations, conditions and payments under said franchises are due.

The City therefore is not only the owners of the subways in question, but is the largest creditor of these defendants. I annex hereto, marked "Exhibit D," copy of the Resolution of the Board of Estimate duly adopted the 15th day of January, 1919; and further, I am instructed to say that if the Comptroller is appointed by the Court as such co-Receiver, he will serve without compensation.

3095 WILLIAM P. BURR.

Sworn to before me this
15th day of January, 1919.

MATTHEW F. DUFFY,
Notary Public,
Kings Co., No. 138.
Kings Co. Register's No. 9030; New York Co. Clerk's No. 61.
New York Co. Register's No. 9060; Bronx Co. Clerk's No. 4.
3096 Bronx Co. Register's No. 906; Queens Co. Clerk's No. 1201.
Term expires March 30, 1919.

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Exhibit A.

THE CITY OF NEW YORK.

DEPARTMENT OF FINANCE.

COMPTROLLER'S OFFICE.

January 6, 1919.

3098

Memorandum for Corporation Counsel

in the Matter of

City's Investment in Rapid Transit Construction under Contract No. 4.

* * *

Contract No. 4 is that contract for which $60,000,000 was appropriated by the Board of Estimate and Apportionment on March 18, 1913, to provide the City's obligation for the construction of rapid transit railroads which are to be operated by the New York Municipal Railway Corporation, a corporation created by the Brooklyn Rapid Transit Company as a subsidiary corporation, for the purpose of operating the rapid transit railroads and the elevated railroads to be connected therewith.

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* * *

Up to March 18, 1913, the City of New York had provided funds for the construction of the BROOKLYN CENTRE STREET LOOP LINES and the FOURTH AVENUE SUBWAY, aggregating $40,501,991.00

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These divisions or lines of the rapid transit railroad were included with the system of rapid transit railroads to be constructed by the City and to be operated by the New York Municipal Railway Corporation under Contract No. 4.

To this $40,501,991, the City, by the Board of Estimate and Apportionment, appropriated on March 18, 1913, an additional amount of 60,000,000.00

3101 to be provided by issue of corporate stock.

This gave a grand aggregate of $100,501,991.00 which the City was to contribute towards the construction of the railroads to be operated under Contract No. 4 and to which construction the New York Municipal Railway Corporation was to contribute $13,500,000.00.

Since March 18, 1913, the City

3102 has appropriated additional funds for the construction of the railroads under Contract No. 4, amounting to 24,309,937.60

thus making a grand aggregate of $124,811,928.60

which the City of New York has already provided for the construction of the rapid transit railroads to be operated and being operated (after a fashion) by the New York Municipal Railway Corporation

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under rapid transit contract No. 4, these railroads forming a part of the so-called Dual System of Rapid Transit Railroads, which is not a dual system at all, because these lines do not link with the system under operation and to be operated by Interborough Rapid Transit Company either under Contracts 1, 2 or 3. Consequently, there are two separate systems of rapid transit railroads within the Greater City, both of them separate and apart, and they therefore do not provide a Dual System, except in name.

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The $124,811,928.60 already provided for by the City and which will later on require to be supplemented by many millions of dollars more before the system is totally constructed, has been applied to the following general purposes, all of which classify under and form a part of the cost of construction as defined by the provisions of the contract, viz.:

For CONSTRUCTION, which includes construction of the railroads and the various stations; station finish; erection of signal towers; purchase and installation of tracks and track materials, and all of the outlays which come within the construction costs under the provisions of the contract	$97,930,392.13
For ACQUIREMENT OF REAL ESTATE required for the construction of the lines	8,006,579.36
For INTEREST ON BONDS ...	17,354,957.11

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For that part of the ENGINEERING and OTHER EXPENSES of the PUBLIC SERVICE COMMISSION from March 18, 1913, to December 31, 1914, which is included in and formed a part of the cost of construction	1,520,000.00
TOTAL PROVIDED by the City up to December 31, 1918, towards the cost of Construction of the Rapid Transit Railroads under	
3107 Contract No. 4	$124,811,928.60

It may be noted from the foregoing that that part of the expenses of the Public Service Commission of the past four years, which is chargeable as cost of construction, viz., from January 1, 1915, to December 31, 1918, has not been included in the preceding statement of the City's Investment for rapid transit construction under Contract No. 4. The total amount of such expenses which form a
3108 part of the cost of construction under Contracts 3 and 4 aggregates $10,500,000, and the division of this amount between Contracts 3 and 4 will be fully 50 per cent. to the latter. These expenses of the Commission have been paid by the City from special revenue bond issues which will be converted into and taken up by rapid transit corporate stock.

The obligation of the New York Municipal Railway Corporation was to contribute $13,500,000 towards the cost of construction and also to contribute the cost of making the physical connection at

Canal Street and Broadway of the Centre Street Loop Line with the Broadway-Fourth Avenue Line. This additional outlay by the Company has aggregated $670,000.

From the $13,500,000 the Company has paid to the City the following sums which were applied to the purposes stated:

For Cost of Awards for Real Estate payable by the City	$4,422,035.69	
For Interest on City's rapid transit corporate stock, applied to the purposes of Contract No. 4.....	660,472.92	3110
The Company has also made the following outlays from the $13,500,000, as per statement furnished by the Public Service Commission in 1914:		
For Debt Discount, which reflects payment on account of the total debt discount of $405,000 to which the Company is entitled on the $13,500,000 to be provided by it towards the cost of construction	172,108.70	3111
For Interest on its subway construction bonds, which reflects a payment on account of the total interest on bonds during construction which will ultimately become a part of the $13,500,000 of the Company's contribution.	923,842.02	
For Legal expenditures	7,505.22	
For Engineering and Superintendence	38,006.74	

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For Miscellaneous Construction expenditures	133,140.63
For Sundry extra Construction Work on the Centre Street Loop Lines done at cost by the New York Municipal Railway Corporation prior to the beginning of operation of these lines in August, 1913, as per statement of the Public Service Commission.	85,350.97
3113 Amounts paid to Jacobs & Davies under contracts, at cost plus profit, for certain connections at the 38th Street Cut, Brooklyn, and of the Centre Street Loop Lines, Brooklyn Bridge to Williamsburg Bridge (estimated)..	3,500,000.00
For deed, dated December 30, 1913, conveying easements between Fourth and Tenth Avenues, Brooklyn, to City of New York (as per provisions of Contract No. 4) the Company is allowed	1,000,000.00
3114	
TOTAL OUTLAYS (as estimated) by the COMPANY from its contribution of $13,500,000	$10,942,462.89
Balance of New York Municipal Railway Corporation's contribution under Contract 4	2,557,537.11
	$13,500,000.00

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From the balance of approximately $2,557,000, the interest on the Company's outlay during construction will require to be paid, together with its engineering costs chargeable to construction, and the balance of the debt discount.

The amount thus indicated (xx), namely, $3,500,000, is the nearest estimate which I have of the cost and is probably within the amount which will be charged by the New York Municipal Railway Corporation as a part of the cost of construction expended under the agreement which it has apparently made with Jacobs & Davies for 3116
the work indicated.

The Company, in addition to contributing $13,500,000 towards the cost of construction of the rapid transit railroads, has also to provide for the equipping of these railroads and in addition to extending and constructing additional tracks to certain of its lines, so shall reconstruct and so add to the existing railroads as to adapt them in all respects for operation in conection with the railroad, as more particularly provided in Article XIII of Contract No. 4.

The estimate, so far as I can learn, of the equip- 3117
ment cost is that it may reach $15,000,000 and the extending and constructing of additional tracks and the reconstructing of existing railroads may altogether aggregate $36,500,000 which, with the contribution of $13,500,000 towards the cost of construction, will make the Company's outlays approximate $65,000,000.

DUNCAN MacINNES,
Chief Accountant.

STATEMENT

OF UNPAID SPECIAL FRANCHISE TAXES, "REAL ESTATE OF CORPORATIONS" TAXES, AND ASSESSMENTS FOR IMPROVEMENTS IMPOSED AGAINST THE COMPANIES CONTROLLED BY THE BROOKLYN RAPID TRANSIT COMPANY.

SPECIAL FRANCHISE TAXES.

Company	Year	Borough	Tax Unpaid	Total
Brooklyn Heights	1917	Brooklyn	$1,108.29	
R. R. Co.	1918	"	1,383.35	$2,491.64
Brooklyn City	1901	Queens	38,195.95	
R. R. Co.	1902	"	29,362.07	
	1903	"	17,832.51	
	1904	"	18,500.88	
	1905	"	18,191.79	
	1906	"	25,164.43	
	1916	Brooklyn	28,498.85	
	1917	Queens	1,207.21	
	"	Brooklyn	66,437.28	
	1918	Queens	31,851.76	416,629.10
	"	Brooklyn	141,386.37	
Brooklyn, Queens	1901	Queens	11,290.07	
Co. & Sub. R. R.	1902	"	3,448.24	
Co.	1903	"	2,138.13	
	1904	"	2,088.37	
	1905	"	1,917.04	
	1906	"	2,535.91	
	1907	"	2,408.38	
	1908	"	3,935.93	
	1916	"	6,921.31	
	"	Brooklyn	16,265.32	
	1917	Queens	12,656.70	
	"	Brooklyn	25,895.39	
	1918	Queens	21,770.73	
	"	Brooklyn	47,248.46	160,519.98

Company	Year	Borough	Tax Unpaid	Total
Coney Island & Brooklyn R. R. Co.	1916	Brooklyn	8,230.67	
	1917	Queens	1,798.45	
	"	Brooklyn	3,739.99	
	1918	Queens	2,681.12	
	"	Brooklyn	34,675.30	51,125.
Coney Island & Gravesend R. R. Co.	1902	Brooklyn	2,702.07	
	1903	"	1,029.78	
	1904	"	1,010.55	
	1917	"	120.00	
	1918	"	2,988.41	7,850.
Nassau Electric R. R. Co.	1907	Brooklyn	102,661.60	
	1908	"	.71	
	1909	"	.06	
	1911	"	133.95	
	1916	"	8,589.44	
	1917	"	62,384.21	
	1918	"	124,071.09	297,841.
DeKalb Ave & North Beach R. R. Co.	1917	Queens	670.06	
	1918	"	1,179.69	1,849.
New York Consolidated R. R. Co.	1916	Brooklyn	60,431.34	
	1917	Queens	3,552.78	
	1918	"	6,005.72	
	"	Brooklyn	214,677.84	284,667.
New York Municipal Rys. Co.	1917	Queens	4,750.25	
	"	"	3,267.81	
	1918	"	101,067.68	
	"	"	29,483.01	138,568.
South Brooklyn Ry. Co.	1917	Brooklyn	186.02	
	1918	"	303.11	489.

Company	Year	Borough	Tax Unpaid	Total
Prospect Park & Coney Island R. R Co.	1917	Brooklyn	640.45	
	1918	"	1,058.83	1,699.28

Total Unpaid Special Franchise Taxes.....$1,363,732.71

"REAL ESTATE OF CORPORATIONS" TAXES.

Company	Year	Borough	Tax Unpaid	Total
Brooklyn Heights R. R. Co.	1918	Brooklyn	606.00	606.00
Brooklyn City R. R. Co.	1893	Brooklyn	49.54	
	1896	"	4,275.03	
	1918	Queens	3,319.77	
	"	Brooklyn	2,588.40	10,232.74
Brooklyn, Queens & Sub. R. R. Co.	1904	Queens	1,709.55	
	"	Brooklyn	926.91	
	1905	Queens	2,779.71	
	"	Brooklyn	1,002.29	
	1906	Queens	2,956.42	
	"	Brooklyn	900.38	
Brooklyn, Queens & Sub. R. R. Co.	1907	Queens	3,719.18	
	"	Brooklyn	960.33	
	1908	Queens	3,724.60	
	"	Brooklyn	1,048.66	
	1909	Queens	4,562.61	
	"	Brooklyn	1,566.19	
	1910	Queens	5,289.18	
	"	Brooklyn	1,487.43	
	1911	Queens	15,202.98	
	"	Brooklyn	2,385.49	

Company	Year	Borough	Tax Unpaid	Total
	1912	Queens	16,078.72	
	"	Brooklyn	2,691.60	
	1913	Queens	15,996.44	
	"	Brooklyn	2,566.62	
	1914	Queens	15,374.13	
	"	Brooklyn	2,424.66	
	1915	Queens	16,269.03	
	"	Brooklyn	2,235.97	
	1916	Queens	17,563.57	
	"	Brooklyn	3,324.95	
	1917	Queens	17,748.48	
	"	Brooklyn	3,314.30	
	1918	Queens	24,350.94	
	"	Brooklyn	5,383.20	195,544.52
Coney Island & Brooklyn R. R. Co.	1900	Brooklyn	60.34	
	1901	"	62.10	
	1902	"	61.19	
	1903	"	1,712.86	
	1904	"	3,775.10	
	1905	"	3,750.33	
	1906	"	4,459.30	
	1907	"	4,413.58	
	1908	"	4,843.60	
	1909	"	6,082.30	
	1910	"	10,889.94	
	1911	"	11,407.63	
	1912	"	13,090.00	
	1913	"	13,412.50	
	1918	"	191.40	78,212.17
Nassau Electric R. R. Co.	1895	"	972.17	
	1896	"	5,730.25	
	1918	"	10,445.40	17,147.82

Company	Year	Borough	Tax Unpaid	Total
New York Consolidated R. R. Co.	1918	Queens	26.51	
	"	Brooklyn	96,507.60	96,534.11
New York Municipal Rys. Co.	1918	Queens	7,501.12	
	"	Brooklyn	35,772.00	43,273.12
South Brooklyn Ry. Co.	1918	Brooklyn	12,135.00	12,135.00
Prospect Park & Coney Island R. R. Co.	1892	Brooklyn	124.20	
	1894	"	136.87	
	1895	"	509.42	
	1896	"	500.33	
	1897	"	235.72	
	1918	"	26.40	1,532.94
Prospect Park & Coney R. R. Co.—South Brooklyn Ry. Co., Lessee	1918	Brooklyn	31,413.37	31,413.37

Total Unpaid "Real Estate of Corporations" Taxes.....$486,631.79

ASSESSMENTS FOR IMPROVEMENTS.

Company	Year	Borough	Improvement	Amount unpaid	Total
Brooklyn Heights R. R. Co.	1902	Brooklyn	Nostrand ave. paving	$729.75	
	1900	"	Gates ave. paving	2,731.43	
	1899	Brooklyn	Court Street	1,710.62	
	"	"	Willoughby St. paving	2,036.60	
	"	"	Joralemon St. paving	787.65	

Company	Year	Borough	Improvement	Amount unpaid	Total
	1897	"	Manhattan ave. paving	1,262.77	
	"	"	Greene ave. paving	1,989.94	
	"	"	Greene ave. paving	1,297.38	
	"	"	Greene ave. paving	3,304.39	
	"	"	Gates ave. paving	1,511.65	$17,362.18
Brooklyn City R. R. Co.	1914	"	16th avenue paving	187.78	
	"	"	Kingston avenue paving	106.44	
	"	"	Malbone street paving	537.38	
	1910	"	Fifth avenue paving	39.49	
	"	"	Halsey street paving	806.78	
	1911	"	57th street paving	1,788.69	
	1910	"	Bay Ridge ave. paving	1,960.40	
	1897	"	Driggs avenue paving	1,295.34	
	1913	"	13th ave. paving	22.93	
	1917	"	59th street paving	34.20	
	1914	"	16th avenue paving	1,989.62	
	"	"	Bay Ridge ave. paving	6,010.00	14,779.05

Company	Year	Borough	Improvement	Amount unpaid	Total
Brooklyn, Queens Co. & Sub. R. R. Co.	1913	"	Metropolitan av. paving	611.00	611.00
Nassau Electric R. R. Co.	1915	"	86th street paving	3,972.35	
	1914	"	New Lotts ave. paving	3,923.17	
	"	"	Church avenue paving	736.91	
	1913	"	Church avenue paving	816.89	
	"	"	Church avenue paving	17.38	
	"	"	67th street paving	.95	
	1912	"	Gravesend ave. paving	3.12	
	1899	"	15th street paving	1,265.62	
	1897	"	South 9th st. paving	604.37	11,340.76

TOTAL UNPAID ASSESSMENTS FOR IMPROVEMENTS	$44,092.99
TOTAL UNPAID SPECIAL FRANCHISE TAXES	$1,363,732.71
TOTAL UNPAID "REAL ESTATE OF CORPORATIONS" TAXES .	486,631.79
TOTAL UNPAID ASSESSMENTS FOR IMPROVEMENTS	44,092.99
GRAND TOTAL	$1,894,457.49

3139

This statement does not include any items of unpaid taxes or assessments for improvements upon lots and buildings owned by the companies controlled by the Brooklyn Rapid Transit System, as any such real property is assessed, not in the name of the owner, but by lot, block and section numbers in the respective boroughs, and without information as to such numbers the amounts of taxes and assessments for improvements imposed thereon cannot be ascertained; nor does the statement include any items of unpaid taxes on personal property, which if they exist would appear upon the 3140
records of the Bureau for the Collection of Personal Taxes.

Exhibit C.

UNPAID CLAIMS AND JUDGMENTS AGAINST THE NEW YORK MUNICIPAL RAILWAY CORPORATION, THE NEW YORK CONSOLIDATED RAILROAD COMPANY AND SUBSIDIARY COMPANIES OF THE BROOKLYN RAPID TRANSIT COMPANY. 3141

THE NEW YORK MUNICIPAL RAILWAY CORPORATION.

The City of New York has a claim now in litigation against this corporation for the sum of $1,990,800, being the amount of a so-called interest allowance made by the Chief Engineer of the Public Service Commission under Contract No. 4 to the cor-

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poration in the prior determination of the cost of construction of the railroad. The City claims that this allowance was unauthorized by the contract and should be stricken out of the account.

This is one of the litigations referred to in the affidavit of the Corporation Counsel.

NEW YORK CONSOLIDATED RAILROAD COMPANY.

	Claims for damage to City property	$27.27
3143	Claim for tolls over Brooklyn Bridge	12,304.20
		$12,331.47

BROOKLYN, QUEENS COUNTY AND SUBURBAN RAILROAD CO.

	Claim for percentage of gross receipts under the Railroad Law (Disputed)	$829,578.89
3144	Claims for paving within the Railroad Area of which amount a claim for $68,739.82 has been reduced to judgment	86,863.79
	Claim for tolls over Williamsburgh Bridge	1,032.40
		$917,474.08

BROOKLYN HEIGHTS RAILROAD COMPANY.		
Claims for tolls over Brooklyn Bridge	$2,208.20	
Claim for percentage of gross receipts under the Railroad Law (Disputed)	6,534,296.50	
Claim for tolls over Williamsburgh Bridge	927.90	
Claims for paving within the railroad area, aggregating $16,627.17, of which claims $1,039.69 has been reduced to judgment	16,627.17	3146
Claims for damages to City property	1,088.91	
	$6,555,148.68	
NASSAU ELECTRIC RAILROAD COMPANY.		
Claim for rent of siding in Washington Street, Brooklyn	$250.00	
Claims for paving within the railroad area, aggregating the sum of	4,025.69	
Claims for damages to City property	721.12	3147
Claims for tolls over Brooklyn Bridge	597.30	
	$5,594.11	
CONEY ISLAND AND BROOKLYN RAILROAD.		
Claim for tolls over Brooklyn Bridge	$745.70	
Claims for paving within the railroad area, aggregating	995.53	
Claim for tolls over Williamsburgh Bridge	297.00	
	$2,038.23	

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CONEY ISLAND AND GRAVESEND RAILROAD.	
Claims for paving within the railroad area, aggregating	$20.38
	$20.38
BRIDGE OPERATING COMPANY.	
Claim for repairing and replacing tracks and electrical equipment on Williamsburgh Bridge	$150,000.00
Claim for tolls over Brooklyn Bridge	733.60
Claim for rental of terminal facilities	2,500.00
	$153,233.60
BROOKLYN RAPID TRANSIT COMPANY.	
Claim for damages to City property	$67.24
	$67.24
Total amount of unpaid claims and judgments	$9,636,707.79

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Exhibit D.

Whereas, the people of The City of New York have invested in the construction of the Rapid Transit Subway Railroads provided by Contract No. 4 between the City and the New York Municipal Railway Corporation the sum of over $124,000,000; and

Whereas, there are now existing claims by the City against the Brooklyn Rapid Transit Company and its subsidiary companies for unpaid paving charges, percentages, car license fees, taxes, etc., amounting to over $11,000,000; and 3151

Whereas, an action has been brought by the Westinghouse Electric and Manufacturing Company in the United States District Court, Southern District of New York, against the Brooklyn Rapid Transit Company, the New York Municipal Railway Corporation and the New York Consolidated Railroad Company to recover about $40,000, and 3152
the said companies have admitted their inability to pay said claim; and

Whereas, in said action and under the said admission and with the consent and approval of defendants in said action, on the 31st day of December, 1918, Lindley M. Garrison was appointed receiver of the property of said Brooklyn Rapid Transit Company, the New York Municipal Railway Corporation and the New York Consolidated Railroad Company and is now in actual possession of the property owned by the City of New York representing an expenditure of over $124,000,000 of the 3153
people's money, including said Rapid Transit Subway properties operated or to be operated by said Municipal Railway Corporation or its assignee, the New York Consolidated Company, under said Contract No. 4, by an order duly made and entered on that day by Judge Julius M. Mayer, of the United States District Court, Southern District of New York: and

Whereas, it is of the utmost importance that the rights of the City, its taxpayers and its people should be protected and secured to the utmost advantage during said receivership, in view of the vast

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sums of money now invested in said properties by the people or due by said companies to The City of New York, it is therefore

Resolved, that the Corporation Counsel be and he hereby is instructed to appear on the return day of said order appointing the said Lindley M. Garrison as such receiver, to wit, January 15th, 1919, and for and in the name of The City of New York then and there to ask for the appointment of the Comptroller, Charles L. Craig, the chief financial officer of The City of New York, as co-receiver in
3155 the said suit now pending in the said United States District Court.

Government's Exhibit 42—Opinion of Mayer, J., Making Receivership Permanent and Denying Motion for a Co-Receiver.

The Court: It is my habit, gentlemen, to endeavor to listen carefully to full argument and then when I have made up my mind to announce that
3156 conclusion as promptly as possible. A decision from the bench has the disadvantage, perhaps, of an occasional inapt use of language, but it has the advantage of at times a more comprehensive and intimate statement than might be possible in a written opinion where the subject matter is largely addressed to the discretion of the Court.

As far as I can gather from what all the counsel have stated, both those who represent some financial aspect of the situation, as well as the attorney, Mr. Erbe, who appeared on his own behalf as a stockholder, there is no objection in any quarter to the

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continuance of the receivership; and as I understood the arguments, their trend inevitably leads to the conclusion that in the interests of all concerned such continuance must be had. Therefore, in so far as the order to show cause is addressed to that subject matter, an order will be made continuing the receivership pending this litigation.

In respect of the questions of intervention, intervention is permissible under equity rule No. 37. Whether or not an order shall be made allowing intervention within the purview of that rule is a matter which requires careful consideration, but 3158
one formal application has been made this morning and upon that point I will consider the subject and in due course determine what shall be done. There is no time limit to be placed upon any application for intervention. Such an application may be made at any time pending the litigation; but it would conduce to the orderly administration of this estate if all those who desire to move for intervention would move with reasonable promptness after they shall have made up their minds as to the course they wish to pursue so that all concerned, including the Court, may know within a 3159
reasonably short time who are made parties to the litigation, and may likewise know the extent or limit of any order which the Court may file in that regard. I therefore hope that by the 3d day of February, 1919, which I believe is on a Monday, that all persons desiring to intervene will move accordingly, although it is to be distinctly understood that any person or group of persons who does not move by that date has the absolute right to move at any time during the pendency of the litigation, and I will hold in reserve as I look at it now, with the right, of course, to change my mind,

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the application made on behalf of the Public Service Commission in that regard.

In the conduct of quite a number of receiverships I have always required that notice be given to any responsible person or group of persons who are in one form or another interested in the litigation, whether their interest is of a character which comes within the equity rule to which I have referred, or not. The files of this Court will show that such has been the proceeding before me as well as before the other judges in the Court in a very

3161 considerable number of receiverships, and of course the receiver will be instructed in respect of any applications to the Court, to notify the various representatives of committees and of the public bodies which have appeared here today. The Receiver and the Court will naturally be anxious to obtain from any of these creditors and public bodies any information or suggestion or advice which ultimately will go to the solution of the problems here involved. And meanwhile, as to the conduct of the Receiver, no one need to have any fear that there will be any step taken in this receivership so far

3162 as the Receiver and the Court here are concerned which will not be fully known and fully understood. I do not mean by that that it will be possible for the Receiver and the Court to consult with every person in regard to every small detail of daily operation, and for that matter I do not expect that any person of sufficient understanding and judgment to be worthy to be a receiver in this Court will be called upon to consult the Court as to what might be called the day by day ordinary conduct of the business of these corporations. The Receiver was appointed, among other things, upon the theory that he would know, as any person at the head of

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an important transportation system ought to know, how to deal with the work-a-day problems that are presented in the operation and conduct of a transit system of this character. But anything that is in any sense substantial, which in any true sense affects not merely the operation of this important system as a system, but affects in a true sense the safety and comfort and the interest of the public at large, anything that is contemplated in such directions will be so thoroughly known and so thoroughly understood that no one can by any manner of means misapprehend that it is the purpose of 3164
the Court and its arm, the Receiver, to conduct this receivership in such manner as to make at least the people of the City a moral partner in the conduct of this receivership.

I think the time is here to depart a little bit from the narrow area of the determination of a motion, because this receivership has very important administrative requirements. Generally speaking, those not skilled in the law do not fully understand what a receivership is and what it means, and those of us who are either at the bar or on the bench are apt to take for granted a considerable 3165
amount of knowledge of those things which we must know professionally, and which, perhaps, others not trained in our profession are not so familiar with. It is very important at the outset of this receivership that there be neither misunderstanding nor misapprehension. The situation of this company may be said to have two general heads: What may be called the physical situation and what may be called the financial situation. In respect of the physical situation we have first the actual physical condition of these properties that are in the charge of the Court. Very shortly after

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the present Receiver was appointed he conferred with the Court and he was instructed by the Court as one of the preliminary steps to endeavor to ascertain the physical condition of the transit system so far as that transit system is under this receivership. I found that the Receiver was highly sympathetic with the Court's view. It is my desire that a complete physical survey shall be made of this system. In view of the fact that a deplorable accident has occurred, it is important that every reasonable and humanly possible effort shall be
3167 taken that no such thing as that can occur upon this system again, while in any event this system is under the charge of this Court. Obviously, where the blame lies for the accident is a matter for judicial determination in other tribunals, so far as fixing the legal liablity is concerned in certain particulars. But at once the Receiver will make every effort to have this physical condition known so that all that can possibly be done with the funds at hand and with funds that it is necessary to be obtained shall be done to make this whole system safe for the carriage of the large numbers of our
3168 inhabitants and our visitors who are carried upon this system daily.

Desiring to avoid, if possible, any greater burden of expense upon those different companies than was necessary to incur, I have asked the Receiver to request the Public Service Commission, and I understand he has so done, to assist him by having their expert man make this physical survey. That request thus made, as I understand, or in any event, to be made, was in a spirit of cooperation.

Utterly irrespective of whatever view may be held by contending parties as to one public body or another, this body is a body charged with certain

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duties under the law and so far as this Receiver and this Court is concerned, we both look to this body for cooperation, within those duties that it is called upon to perform; and it is our purpose to deal with the Public Service Commission so far as the Court is concerned—and when I say the Court necessarily I speak for the Court's arm as Receiver—it is our purpose to deal with the Public Service Commission, not at arm's length, not with technical resistance, but in a cooperative spirit, desiring wherever possible to observe any requirements that in good judgment and in fair conclu- 3170
sion they deem proper, after an appropriate inquiry to safeguard the lives and comfort of the traveling public in this city. The Public Service Commission will find upon the part of this Receiver no effort technically to avoid whatever may be the proper and just efforts on the part of the Public Service Commission, designed, as I have repeatedly said, for the proper operation of this railroad from the standpoint of safety.

There is a second consideration under that general head. It must be the effort of the Receiver to, if possible, to attract the good will of those who 3171
are daily traveling upon this railroad. It is said—and I make no comment one way or the other—that there is a lack of kindly attitude on the part of the traveling public who use this system towards this road. If that be so, it is the duty unquestionably the purpose of the Receiver, as is well evidenced by his report, which he has gathered in the short time with commendable care—it is his effort, and must be his effort and his duty to so conduct this railroad as to endeavor to give to the people traveling over it a service which they shall regard as reasonable and fair.

3172 Of course the result cannot be accomplished at once, because an ideal service will require doubtless a great deal yet to be done, and will require possibly more money than is now at hand. But I think if it is understood that the Receiver and the Court approach the problem from the point of view indicated, that any reasonable man, not misled by misapprehension or misunderstanding will be very glad, day by day, to see improved conditions rather than to see unsatisfactory service continued.

Now, in respect of the internal conditions of this
3173 company, I thought that the Receiver should not make any radical changes, if at all, until after this motion shall have been heard. It seemed to me that it was perhaps inadvisable for him to endeavor to shape the internal policy of this company before he knew whether or not he was to be the single Receiver or to be associated with others. Therefore, I deemed it unwise that any steps should be taken which would be perhaps misunderstood from one quarter or another, and that except in so far as imminent demands were to be met, he should endeavor to preserve the status quo until after the
3174 hearing and determination of this motion. He has already started to investigate the situation, and from the official of the highest standing in point of authority and compensation to the employee of the humblest duties, the Receiver will of course make a careful investigation to see first what is the ability of the various officers and employees, and, secondly, what is their compensation, and thirdly, what in right and justice should be done or should be recommended to be done. By that I do not wish to be understood—because I am talking very frankly—as thinking for one moment that under present conditions of living it would be possible or fair or

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right to reduce in any manner, shape or form, the present wage of the man who in one capacity or another—men and women—as trainmen and gatemen, and the like, persons working in the power houses and on the tracks—I do not think for one minute that these compensations should be reduced, not through any mere notion in my mind, but because with the present cost of living it would be extremely desirous that a fair wage should be paid to these employees, most of whom, so far as I have been able to observe them, are earnest and intelligent and faithful, and who are entitled as 3176
a matter of health and safety to the public at large to be compensated at least at the rate at which they are now compensated, with no fear whatever of reduction in that regard. But in respect of others who can be replaced, the Receiver, of course, will make a careful examination to ascertain what is best in the interest of the company and its creditors—whether its creditors be individuals or be public bodies—what is best to be done. So much for that.

Now in respect to the financial situation, the arguments this morning have merely confirmed together with the report of the Receiver laid upon 3177
my desk, the conclusion that here is a very difficult situation, but a situation by no means impossible of solution. It is a situation where there are various interests, and no one interest should justly be subordinated beneath its legal rights. By whatever name called, the City has a large interest, and so have these persons who have purchased these notes aggregating outstanding now some fifty-seven million dollars. So, likewise, have the creditors of all kinds, tort and contract. All these have interests, and they will never attain the right result unless their attitude towards each other is

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one of co-operation. This receivership can be successful and I trust will be successful. If it fails to accomplish what all right-minded men hold it is to accomplish, it will fail merely because, through no fault of its own, it does not receive co-operation in every quarter, public and private.

In respect of the financial situation, it was very well said I think by several of the counsel that the situation is quite different from that in which some previous railway situations were found. It is perfectly plain that there must be a result—

3179 if there is to be a result—in the readjustment of this company by whatever name called, whether adjustment or reorganization or refinancing, which can be attained only by the concurrence of many elements. The kind of readjustment or reorganization which is possible where only it is concerned with private individuals who hold securities or stocks, is not possible here in the sense that such an arrangement can be made as has frequently been made outside of the Court. That problem is not at hand for the moment. But when the time comes that earnest men representing all interests,

3180 public and private, shall seek to solve this problem, they may as well understand now, all of them, that in view more especially of the recent practices and decisions of this Court, this receivership will not leave this court until any plan is thoroughly well understood by the Court and has the Court's approval. That is said because it is fair to state that no longer can those who are only privately interested in the sense of being private persons—privately interested is not a good phrase, I mean those who are private persons—can no longer arrange the basis upon which the future of the company in receivership shall be conducted, without

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that basis being of a character which is satisfactory to the Court, after full, free and fair discussion on the part of every one who has a right to be heard.

Having thus I think made clear several of the views which the Court entertains, and having by practically unanimous understanding made clear to the persons who are or will be tort claimants the position of the Court, I come to the final question with which we are now to deal.

Any application on the part of the City of New York, or on the part of the Public Service Commission is entitled to most careful and most respectful consideration. These gentlemen who represent these two important public bodies are either on the one hand the direct selection of the people, or on the other hand the selection of the people by the appointment of the Governor as the statute provides. Any application which comes from such sources is not lightly to be laid aside. But both Mr. Bisbee and Mr. Erbe, whom I have not the pleasure of knowing or seeing before today—the other counsel being I hope old friends and all known to me—they put the matter very aptly. The argument of the learned counsel for the City and the learned counsel for the Public Service Commission indicates that there is lack of agreement between these two great bodies in some respects which were stated. One official thinks that the other body is not entitled to representation. One counsel things that whatever else happens, there should at least be additional representation which would represent the city. I fear there has been a misapprehension as to what a receivership is. Under a receivership—I am stating the very simplest of principles—the property is taken into the possession of the Court. It is the Court's duty

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to conserve the property while thus in its possession. The Court has no power to breach contracts. Valid outstanding contracts and obligations must be observed. In a suitation of this kind there are obviously legal perplexities which will find their solution only in the determination of courts; in some instances perhaps in the determination of the United States District Court of the Southern District of New York; in other instances possibly by the determination of the New York Courts. The receiver cannot favor or omit to favor either pri-

3185 vate or public creditors by any action on his part. He is not a law unto himself any more than the Court is. The receiver is merely the instrument of the Court, because theoretically if the Court had the time it would be the Court's duty personally to administer itself the entire receivership.

I think the representatives of the City and of the Public Service Commission manifestly have some firm convictions as to the rights they represent and as to the policies which in their judgment should be pursued. Whether one or two additional men are appointed, it must be plain that it would

3186 be impossible for the Court successfully or intelligently to conduct a complex receivership of this kind with other receivers representing not the Court but representing some point of view which might or might not accord with the point of view entertained by the receiver appointed by the Court. Such a situation is not known in receiverships. Such a situation might seriously tend to destroy the efficiency of the receivership, and a receivership specially of this character, and might transfer from a forum outside the receivership and the Court the controversies which might properly be settled at some place and time other than by this Court.

All that this receiver is called upon to do is what I have heretofore stated. He is called upon to see that the road gets into good physical condition, if in any respect anything in that regard is to be done. He is called upon to operate this road to the best of his ability. He is called upon to meet present obligations as best he can. He is called upon to borrow money upon a proper showing that money is needed. He is called upon to use every effort within his power to obtain with the aid of the proper officials, the completion of thoes parts of this road which are not yet constructed and without which even any uninformed person must see 3188
that this road cannot reach its highest earning capacity, not to speak of its failure to supply to the people of the City those transportation facilities which they so hope for and to which they are entitled.

To repeat again, the whole situation is one where the Court is the receiver, and where the Court is entitled to have as its arm at all times singularity of purpose. It must be quite plain that the Court is unable at this time, either on the one hand to appoint a co-receiver, which would be simply hav- 3189
ing two men where in the Court's judgment in the circumstances of this case one man could competently do, or on the other hand, accepting not the Court's appointment, but the nomination by a public body of a gentleman charged with various responsible duties, who is necessarily very completely and greatly occupied otherwise, who shall act as receiver, not as the Court's arm, but as representing what is regarded as the rights of one of the very and extremely important units which have come into this situation.

3190 I do not for a moment foreclose the proposition that there may readily come in the course of this receivership a time when one or more receivers may be regarded as helpful and necessary to the Court. I can imagine that when the time comes to work out the financial future of this company; that the aid of a receiver representing at that time the united view of the public authorities, may be of great service, and I do not wish to be understood as dealing with anything but the situation as it now stands upon this 15th day of January, 1919.

3191 There may very well be a time—I repeat—when especially in dealing with the financial situation, it may become extremely helpful and cooperative to have an additional receiver, but I do not see that that time is here at the moment. At this moment what this receivership is concerned with is to get down to business as fast as it can. It has already started. No one questions the standing and ability of this receiver.

I may add, however, for the information of those who perhaps for the moment have lost sight of the fact that one of the great elements of value to the

3192 Court of this receiver, in addition to his known qualities of executive ability, is the fact that for many years he had the highly useful experience of being himself a Chancellor, a Judge of a Court of Equity, in a very great Court, which had had a reputation in the history of American jurisprudence second to none, in which Court it was his duty to sit where I now sit in the sense of being an administrator, and in which court, through a very long and varied experience, he became familiar with the obligations and duties which fall upon a Court of Equity in an administration of this character. I congratulate not merely myself but all those who

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are concerned that it was possible to have a man of that peculiar equipment in this extremely important and delicate situation, willing to lay aside in very great measure his private practice at the bar and devote himself, both as an administrator and as a former experienced Judge to the great problem with which he will have to deal.

In these circumstances, gentlemen who have addressed me, gentlemen of the Bar, I deny the motion for a co-receiver without prejudice to its renewal at such time as counsel may be advised.

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The Clerk will now announce an adjournment.

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3196 **Government's Exhibit 43—Notice and Order Continuing Receivership During Pendency of Suit.**

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

3197	WESTINGHOUSE ELECTRIC AND MANUFACTURING COMPANY, Plaintiff, against BROOKLYN RAPID TRANSIT COMPANY, NEW YORK MUNICIPAL RAILWAY CORPORATION and NEW YORK CONSOLIDATED RAILROAD COMPANY, Defendants.	In Equity E 15-347.

3198 PLEASE TAKE NOTICE That an order of which the within is a copy was duly signed and entered on the 22nd day of January, 1919.

Dated, New York, January 22, 1919.

WALTER F. TAYLOR,
Solicitor for Plaintiff,
Office and P. O. Address,
54 Wall Street,
Borough of Manhattan,
New York City.

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To

LINDLEY M. GARRISON, Esq., Receiver.

GEORGE W. YEOMANS, Esq., Solicitor for Defendants.

WILLIAM P. BURR, Esq., Corporation Counsel for the City of New York.

GODFREY GOLDMARK, Esq., Solicitor for Public Service Commission.

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GEORGE S. FRANKLIN, Esq., Solicitor for War Finance Corporation.

PAUL D. CRAVATH, Esq., Solicitor for Central Union Trust Company of New York, et al., Stockholders' Committee.

ELDON BISBEE, Esq., Solicitor for Wiggins, et al., Stockholders' Committee.

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JOHN J. O'LEARY, Esq., Solicitor for Victims of Malbone Street Accident.

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Order Continuing Receivership.

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

WESTINGHOUSE ELECTRIC AND MANUFACTURING COMPANY, Plaintiff, against BROOKLYN RAPID TRANSIT COMPANY, NEW YORK MUNICIPAL RAILWAY CORPORATION and NEW YORK CONSOLIDATED RAILROAD COMPANY, Defendants.	In Equity E 15-347.

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This cause came on to be further heard at this time and was argued by counsel; and thereupon, upon consideration thereof, it was

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ORDERED, ADJUDGED AND DECREED as follows, viz.:

Lindley M. Garrison, heretofore appointed temporary receiver of the defendants Brooklyn Rapid Transit Company, New York Municipal Railway Corporation and New York Consolidated Railroad Company, and of their several and respective properties and assets, is hereby appointed and continued as receiver during the pendency of this suit

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of said defendants and each of them, and of all the property and assets of said several defendants, real, personal and mixed, of whatsoever kind and description, and wheresoever situated, including all power-houses, power plants and substations owned, leased or operated by defendant Brooklyn Rapid Transit Company, and all railroads owned, leased or operated by the defendants, New York Municipal Railway Corporation and New York Consolidated Railroad Company, or either of them, all tracks, terminal facilities, offices, shops and all buildings and appurtenances of every kind, all cars and other rolling stock and equipment, tools, machinery, furniture, fixtures, materials and supplies, books of account, records and other books, papers and accounts, cash in bank, on deposit and in hand, money, debts, things in action, credits, stocks, bonds, evidences of indebtedness, securities, leases, contracts, muniments of title, bills receivable, rents, issues, profits and income accruing and to accrue, as well as all interest, easements, privileges and franchises, and all assets of every kind, character and description of each of the defendants herein.

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Said receiver is authorized immediately to take and continue possession of and to run, manage and operate said properties and assets of the several defendants herein in such manner as will, in the judgment of said receiver, produce most satisfactory results, so that the operation of the system of street, surface and rapid transit lines controlled by the defendant Brooklyn Rapid Transit Company shall be continued and the public duties obligatory upon the respective defendants be in all respects discharged, and to exercise the authority and franchises of the respective defendants and

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discharge their public duties and preserve and protect the properties and assets of said several defendants in proper condition and repair, and to protect the title and possession, and to secure and develop the business of the same, and in the discretion of said receiver to employ and discharge and fix the compensation of all officers, attorneys, managers, superintendents, agents and employees, and to make such payments and disbursements as may be needful and proper in so doing.

Said receiver is hereby authorized to collect and
3209 receive the rents, income, tolls and profits of the properties and assets of the several defendants and each of them and to make appropriate payments therefrom on account of accruing rents and other necessary charges, and said receiver shall have power to redeem any and all securities of the several defendants now pledged as security on loans of money, and shall have power to borrow money if needful in his judgment in order to comply with this direction, and also, so far as may be necessary, to meet current requirements for labor, materials and supplies, and for the other purposes in this
3210 order expressly authorized, but for no other purpose, without the further order of this Court; and said receiver is hereby fully authorized and empowered to institute and prosecute all such suits as may be necessary in his judgment for the proper protection of the property and trusts hereby reposed in him, and likewise to defend all actions instituted against him as receiver and also to appear in and conduct the prosecution or defense of any suits now pending in any court against the defendants or any of them, the prosecution and defense of which will in the judgment of said receiver be

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necessary for the proper protection of the property placed in his charge or the interests and rights of creditors connected therewith; and said receiver is hereby authorized in his discretion from time to time out of the funds coming into his hands to pay the expenses of operating said properties and executing his trusts, and to make such repairs to said properties and premises as in his judgment may be necessary in order safely to conduct operations under this order and to pay all taxes and assessments upon said properties or any part thereof; and all such rentals and instalments as may fall 3212
or become due for the use of any portion of any of said properties; and also to pay and discharge all claims arising from the previous operation of said properties as in his judgment on examination are proper to be paid as expenses of operation and the current and unpaid payrolls and vouchers and supply accounts incurred in the operation of said property at any time within four months prior to the filing of the bill of complaint herein. Said receiver is hereby required to open books of account wherein shall be stated separately the earnings, expenses, receipts and disbursements in respect of 3213
the property of each of the defendants herein, and shall preserve proper vouchers for all payments made by said receiver.

Each of the defendants and each and every one of their respective officers, directors, agents and employees, and all persons claiming and acting by, through or under them, or any of them, are hereby required and commanded forthwith upon demand of said receiver, or of his duly authorized agent, to turn over and deliver to said receiver, or his duly authorized agent, any and all books of

3214 account, vouchers, papers, deeds, leases, contracts, bills, notes, accounts, moneys or other property in his hands, or under his control, and each of said directors, officers, agents and employees is hereby commanded and required to obey such orders as may be given to them from time to time by said receiver or his duly authorized agent, in conducting the operations of the properties and assets of the respective defendants and in discharging his duties as receiver.

The defendants Brooklyn Rapid Transit Com-
3215 pany, New York Municipal Railway Corporation and New York Consolidated Railroad Company, and each of them, and their and each of their officers, directors, agents and employees, and all other persons claiming to act by, through or under said defendants or any of them, are hereby enjoined from interfering in any way whatever with the possession or management of any part of the properties and assets over which the receiver is hereby appointed or interfering in any way to prevent the discharge of his duties or his operation of said property, and any party in interest may apply
3216 for further direction.

The statement of the powers, duties and rights of said receiver contained in this order supersedes, from and after the entry of this order, the statement thereof contained in the order dated and filed herein December 31, 1918.

The bond in the sum of One hundred thousand ($100,000) Dollars heretofore given by said receiver for the faithful performance of his duties and filed in this cause shall stand and said bond hereby is approved.

The applications made herein on behalf of the City of New York and on behalf of the Public

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Service Commission for the First District of the State of New York for the appointment of an additional receiver or receivers herein are hereby denied without prejudice to the right to renew said applications or either of them at such time as counsel may be advised.

Decision upon the application of the Public Service Commission for the First District of the State of New York for leave to intervene as a party herein is hereby reserved.

Notice of all subsequent proceedings herein other than those relating to the ordinary current administration of the receivership shall be given to the solicitors for the follwing, namely: 3218

The City of New York,

The Public Service Commission for the First District of the State of New York,

War Finance Corporation,

Central Union Trust Company of New York and others, as a Committee of Noteholders and Bondholders constituted and acting under a Deposit Agreement dated January 2, 1919. 3219

Albert H. Wiggin and others, as a Committee of Stockholders constituted and acting under a Deposit Agreement dated January 2, 1919.

The Association representing victims of Malbone Street accident which was heard through counsel at the proceedings on January 15, 1919.

Any party in interest may apply for further direction.

Dated, New York, January 22, 1919.

JULIUS M. MAYER,
U. S. D. Judge.

3220

(Endorsed.)

C15-347

District Court of the U. S. for the Southern District of New York. — Westinghouse Electric & Manufacturing Company, Plaintiff, against Brooklyn Rapid Transit Company, New York Municipal Railway Corporation and New York Consolidated Railroad Company, Defendants.

3221

Order and Notice.

Walter F. Taylor, Solicitor for Plaintiff, 54 Wall Street, Borough of Manhattan, New York City, — U. S. District Court. — Filed, Jan. 22, 1919. — S. D. of N. Y.

3222

Government's Exhibit 46—Application of Receiver for Leave to Employ Certified Public Accountants. 3223

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

WESTINGHOUSE ELECTRIC AND MANUFACTURING COMPANY, Plaintiff,	3224
against	Equity E15-347.
BROOKLYN RAPID TRANSIT COMPANY, NEW YORK MUNICIPAL RAILWAY CORPORATION and NEW YORK CONSOLIDATED RAILROAD COMPANY, Defendants.	Notice of Motion.

Sirs:

3225

PLEASE TAKE NOTICE that on the annexed verified petition of LINDLEY M. GARRISON, as Receiver of the Brooklyn Rapid Transit Company, New York Municipal Railway Corporation and New York Consolidated Railroad Company, we will move this Court before the Honorable Julius M. Mayer at Room 235, Post Office Building, New York City, New York, on the 27th day of January, 1919, at 2:00 o'clock P. M. or as soon thereafter as counsel can be heard, for an order granting the relief prayed for in said petition and

3226

for such other and further relief as to the court may seem proper.

Dated, New York City, January 22, 1919.

Yours, etc.,

HORNBLOWER, MILLER,
GARRISON & POTTER,
Solicitors for Receiver,
Office & Post Office Address,
24 Broad Street,
Borough of Manhattan,
New York City.

3227

To

WALTER F. TAYLOR, Esq.,
Solicitor for Plaintiff.

GEORGE D. YEOMANS, Esq.,
Solicitor for Defendants.

WILLIAM P. BURR, Esq.,
Corporation Counsel of the City of New York.

3228

WILLIAM L. RANSOM, Esq.,
Solicitor for the Public Service Commission for the First District.

CRAVATH & HENDERSON, Esqs.,
Attorneys for Central Union Trust Company of New York and others, constituting a Committee of Note Holders.

3229

RUSHMORE, BISBEE & STERN, Esqs.,
CULLEN & DYKMAN, Esqs.,
Attorneys for Committee of Stockholders of the Brooklyn Rapid Transit Company.

JOHN J. O'LEARY, Esq.,
Attorney for certain Tort Claimants.

CENTRAL UNION TRUST COMPANY OF NEW YORK,
Trustee under various mortgages and deeds of trust of the Brooklyn Rapid Transit Company, New York Municipal Railway Corporation and New York Consolidated Railroad Company.

3230

EQUITABLE TRUST COMPANY OF NEW YORK,
Trustee of the First Mortgage of the Brooklyn Rapid Transit Company to Central Trust Company of New York, dated, October 1, 1895.

GEORGE S. FRANKLIN, Esq.,
Solicitor for the War Finance Corporation.

3231

3232 **Government's Exhibit 46.**

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

WESTINGHOUSE ELECTRIC AND MANUFACTURING COMPANY, Plaintiff, against BROOKLYN RAPID TRANSIT COMPANY, NEW YORK MUNICIPAL RAILWAY CORPORATION and NEW YORK CONSOLIDATED RAILROAD COMPANY, Defendants.	Equity E15-347.

APPLICATION OF RECEIVER FOR LEAVE TO EMPLOY CERTIFIED PUBLIC ACCOUNTANTS.

3234

To the Honorable Judges of the District Court of the United States for the Southern District of New York:

The petition of Lindley M. Garrison, Receiver of the defendants Brooklyn Rapid Transit Company, New York Consolidated Railroad Company and New York Municipal Railway Corporation, duly appointed herein, upon information and belief, respectfully shows to the court as follows:

It has been suggested to your petitioner that there should be a partial audit of the books and

3235

accounts of the receivership companies and in the event that such partial audit should indicate that a general audit is desirable that such general audit should thereupon be undertaken. It is suggested that it would probably be wise to make a test audit covering a limited period, say at least two or three months, in order to determine whether or not the general system of accounting is thorough and satisfactory.

It is further suggested that assuming that an examination did not indicate the necessity of a general audit for a longer period certain particular questions should be the subject of special investigation by the accountants in consultation with the traffic and engineering experts. 3236

In the opinion of petitioner it is advisable that certified public accountants should be employed by him in accordance with this suggestion and that the expense involved should be initially paid by the receivership estate with the understanding that eventually the receivership estate will be reimbursed for said expense by one or more of the Committee of security holders interested in securing the information furnished by such accounting to such extent as the Court may ultimately determine to be equitable. 3237

WHEREFORE, your petitioner prays that he may be authorized and directed to employ certified public accountants to make such an examination of the books and accounts of the companies whose properties are in the possession of your Receiver as to him may seem wise, and that he may

3238

be authorized initially to pay the cost of such accounting out of the funds in his possession.

Brooklyn, N. Y., January 22, 1919.

HORNBLOWER, MILLER,
GARRISON & POTTER,
Solicitors for Receiver,
Office & Post Office Address,
24 Broad Street,
Borough of Manhattan,
City of New York.

3239 CARL M. OWEN,
Of Counsel.

County of New York, ss.:
State of New York,

LINDLEY M. GARRISON, being duly sworn, deposes and says that he is the petitioner herein; that he has read the foregoing petition and knows the contents thereof; that the same is true to the knowledge of deponent except as to the matters therein stated to be alleged on information and
3240 belief, and that as to those matters he believes it to be true.

(Signed) LINDLEY M. GARRISON.

Sworn to before me this
22nd day of January, 1919.

WM. R. SAINSBURY,
Notary Public (Seal),
Kings County, No. 20.
Certificate filed in N. Y. County No. 380; New York Register No. 10333.
Commission expires Mar. 30, 1920.

Government's Exhibit No. 51—Order Authorizing Receiver to Employ Certified Public Accountants. 3241

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

WESTINGHOUSE ELECTRIC AND MANUFACTURING COMPANY, Plaintiff, against BROOKLYN RAPID TRANSIT COMPANY, NEW YORK MUNICIPAL RAILWAY CORPORATION and NEW YORK CONSOLIDATED RAILROAD COMPANY, Defendants.	Equity E15-347.

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3243

SIRS:

PLEASE TAKE NOTICE that an order of which the within is a copy will be presented to the Honorable Julius M. Mayer, Judge of this Court, for settlement and signature at his Chambers in the United States District Court for the Southern District of New York in the Woolworth Building, in

3244

the City of New York, on the 1st day of February, 1919, at 10:00 o'clock in the forenoon.

Dated, New York, N. Y., January 30, 1919.

Yours, etc.,

HORNBLOWER, MILLER, GARRISON
& POTTER,
Solicitors for Lindley M. Garrison,
Receiver,

3245

Office & Post Office Address,
24 Broad Street,
Borough of Manhattan,
New York City.

To

WALTER F. TAYLOR, Esq.,
Solicitor for Plaintiff.

GEORGE D. YEOMANS, Esq.,
Solicitor for Defendants.

3246

WILLIAM P. BURR, Esq.,
Corporation Counsel of The City of New York.

GODFREY GOLDMARK, Esq.,
Solicitor for the Public Service
Commission for the First District.

GRAVATH & HENDERSON, Esqs.,
Attorneys for Central Union Trust Company
of New York and others, constituting a
Committee of Note Holders.

3247

RUSHMORE, BISBEE & STERN, Esqs.,
CULLEN & DYKMAN, Esqs.,
Attorneys for Committee of Stockholders of the Brooklyn Rapid Transit Company.

JOHN J. O'LEARY, Esq.,
Attorney for certain Tort Claimants.

LARKIN & PERRY, Esqs.,
Solicitors for Central Union Trust Company of New York, Trustee under various mortgages and deeds of trust of the Brooklyn Rapid Transit Company, New York Municipal Railway Corporation and New York Consolidated Railroad Company.

3248

MURRAY, PRENTICE & HOWLAND, Esqs.,
Solicitors for Equitable Trust Company of New York, Trustee of the First Mortgage of the Brooklyn Rapid Transit Company to Central Union Trust Company of New York, dated October 1, 1895.

GEORGE S. FRANKLIN, Esq.,
Solicitor for the War Finance Corporation.

3249

3250 **Government's Exhibit 51—Order.**

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

WESTINGHOUSE ELECTRIC AND MANUFACTURING COMPANY, Plaintiff, against BROOKLYN RAPID TRANSIT COMPANY, NEW YORK MUNICIPAL RAILWAY CORPORATION and NEW YORK CONSOLIDATED RAILROAD COMPANY, Defendants.	Equity E15-347. Order.

3251

On reading and filing the petition of LINDLEY M. GARRISON, as Receiver of the Brooklyn Rapid Transit Company, New York Municipal Railway Corporation and New York Consolidated Railroad Company, verified January 22, 1919, requesting authority to employ certified public accountants, and it appearing that due notice of this petition was given to Walter F. Taylor, Esq., Solicitor for plaintiff; George D. Yeomans, Esq., Solicitor for defendants; William P. Burr, Esq., Corporation Counsel of the City of New York; Godfrey Goldmark, Esq., Solicitor for the Public Service Commission for the First District; Cravath & Henderson, Esqs., Attorneys for Central Union Trust Company of New York and others, constituting a Com-

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mittee of note holders; Rushmore, Bisbee & Stern, Esqs., and Cullen & Dykman, Esqs., Attorneys for Committee of Stockholders of the Brooklyn Rapid Transit Company; John J. O'Leary, Esq., Attorney for certain tort claimants; Central Union Trust Company of New York, Trustee under various mortgages and deeds of trust of the Brooklyn Rapid Transit Company, New York Municipal Railway Corporation and New York Consolidated Railroad Company; Equitable Trust Company of New York, Trustee of the First Mortgage of the Brooklyn Rapid Transit Company to Central Union Trust 3254
Company of New York, dated October 1, 1895; and George S. Franklin, Esq., Solicitor for the War Finance Corporation; and no one appearing in opposition,

Now, on motion of HORNBLOWER, MILLER, GARRISON & POTTER, solicitors for Lindley M. Garrison, as said Receiver, it is

ORDERED, that said Lindley M. Garrison as said Receiver be and he is hereby authorized and directed

(1) To employ certified public accountants to 3255
make such examination of the books and accounts of the companies whose properties are in the possession of said Receiver as to him may seem wise, and

(2) To pay the cost of such accounting out of the funds in his possession, subject, however, to the reservation that, as this Court may ultimately determine, arrangements may be made by which the cost of such accounting shall be reimbursed in whole or in part to the Receiver by any party or parties to this proceeding and by one or more of

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the Committees of security holders interested in securing and obtaining the benefit of the information furnished by such accounting.

Nothing herein contained shall be deemed in any way to limit the Court in making such further order or orders respecting an examination of the books of the said companies as to the Court may seem wise.

Dated, New York, N. Y., Feb. 1, 1919.

JULIUS M. MAYER,
U. S. D. J.

3257

Government's Exhibit No. 109—Bill of Complaint (Verified March 20, 1919).

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

3258

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,
Plaintiff,

against

NEW YORK RAILWAYS COMPANY,
Defendant.

To the Judges of the District Court of the United States for the Southern District of New York:

Plaintiff, the American Brake Shoe and Foundry Company, a corporation duly organized and exist-

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ing under the laws of the State of Delaware, and a citizen of said State, brings this its bill of complaint on its behalf and on behalf of all other creditors of New York Railways Company, defendant, who may hereafter join in the prosecution of this suit against the New York Railways Company, a corporation organized and existing under and by virtue of the laws of the State of New York, and a citizen of said State, resident in the Southern District of New York, and thereupon plaintiff alleges as follows:

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FIRST.—That plaintiff, The American Brake Shoe and Foundry Company, is a corporation duly organized and existing under the laws of the State of Delaware and a citizen and resident of said State.

SECOND.—On information and belief, that the defendant was at all the times hereinafter mentioned and is a corporation duly organized and existing under and by virtue of the laws of the State of New York and a citizen of said State, having its principal office in the City of New York, and a resident of the Southern District of New York.

3261

THIRD.—That this is a suit of a civil nature in equity; that the matter in dispute exceeds the sum of Five thousand Dollars ($5,000.00), exclusive of interest and costs, and is between citizens of different States.

FOURTH.—On information and belief, that the defendant, New York Railways Company, is a street surface railroad corporation duly formed

3262 pursuant to Sections 9 and 10 of the Stock Corporation Law by the filing of its certificate of incorporation in the office of the Secretary of State on or about the 29th day of December, 1911; that on or about the 29th day of December, 1911, the railroads, franchises and properties of the Metropolitan Street Railway Company were sold to a purchasing committee representing holders of certain issues of Metropolitan Street Railway Company bonds pursuant to various decrees of foreclosure and sale filed in the office of the clerk of the United
3263 States Circuit Court for the Southern District of New York in certain causes in equity therein pending; that in the two separate decrees confirming such sale by the United States Circuit Court express provision was made for the assignment by the purchasers of the properties and railroads so acquired to a corporation of the State of New York authorized by law to receive title to and to operate such properties and railroads; that defendant, which had been duly formed pursuant to the provisions of law applicable to the reorganization of insolvent corporations by said purchasers and
3264 their associates, for the purpose of carrying out and performing a plan and agreement of reorganization theretofore entered into to take and possess the railroads, franchises and properties of the Metropolitan Street Railway Company so sold and acquired by the purchasers, on December 30, 1911, entered into an agreement of sale with said purchasers; that thereafter, by deed dated December 30, 1911, and recorded in the office of the Register of the County of New York in Liber 3 of General Conveyances, at page 34, said purchasing committee conveyed all such railroads, franchises and properties to the defendant. That defendant is

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now the owner of all the railroads, franchises and properties formerly belonging to the Metropolitan Street Railway Company and is vested with all the rights and is subject to all the obligations of that company; that the defendant entered into possession of the said railroads, franchises and properties at midnight on December 31, 1911, and has continuously operated said railroads since that date.

FIFTH.—On information and belief, that the defendant is the owner of and operates certain street surface railroads in and on certain streets, high- 3266
ways and public places in the Borough of Manhattan, City of New York, and in addition to the railroad owned operates in connection therewith, either as lessee or under the terms of operating agreements, the street surface railroads in the Borough of Manhattan of the following companies:

The Broadway and Seventh Avenue Railroad Company,
The Bleecker Street and Fulton Ferry Railroad Company,
Christopher and Tenth Street Railroad Com- 3267
pany,
Eighth Avenue Railroad Company,
Fort George and Eleventh Avenue Railroad Company,
The Forty-second Street and Grand Street Ferry Railroad Company,
New York and Harlem Railroad Company (City Line),
The Ninth Avenue Railroad Company,
The Sixth Avenue Railroad Company in the City of New York,

3268

Thirty-fourth Street Crosstown Railway Company,

Twenty-third Street Railway Company, and that under the leases of the aforesaid properties it is, among other things, provided that in case the defendant shall fail to pay the rent provided for in said leases as the same should accrue, and any such default should continue for certain periods therein stated, the leasehold estate hereby created might, at the option of the lessors, be terminated.

3269 SIXTH.—On information and belief, that said defendant has an authorized capital stock issued and outstanding of $17,495,060.00; that the lines of railway owned by said defendant are subject to the following mortgage indebtedness, which is now outstanding:

	Amount Outstanding
First Real Estate and Refunding Mortgage	$18,061,289.75
Adjustment Mortgage	30,609,487.44
3270 Convertible Scrip	2,250.00
Lexington Avenue and Pavonia Ferry Railroad Company, First Mortgage	5,000,000.00
Columbus and Ninth Avenue Railroad Company, First Mortgage	3,000,000.00
Broadway Surface Railroad Company, First Mortgage	1,500,000.00
South Ferry Railroad Company, First Mortgage	350,000.00
Central Crosstown Railroad Company, First Mortgage	250,000.00

3271

That the lines leased or operated under agreement are subject to the following mortgage indebtedness now outstanding:

Broadway and Seventh Avenue Railroad Company, First Consolidated Mortgage	$8,150,000.00
Christopher and Tenth Street Railroad Company, First Mortgage	210,000.00
Twenty-third Street Railway Company, Improvement and Refunding Mortgage	1,500,000.00
Bleecker Street and Fulton Ferry Railroad Company, First Mortgage	700,000.00
Thirty-fourth Street Crosstown Railway Company, First Mortgage	1,000,000.00

3272

That plaintiff is informed and believes that failure to meet the interest on such mortgage indebtedness, as such interest matures, other than interest on the aforesaid Adjustment Mortgage indebtedness, which accrues only as earned, will operate also as a default under the mortgage securing the indebtedness the interest on which shall so become in default and render such mortgage enforceable.

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SEVENTH.—On information and belief, that the defendant, since entering into possession as aforesaid, has operated all the lines owned and leased by it as parts of a single system, constituting routes over different lines or parts of line, connecting separated lines over parts of intermediate leased or owned lines or lines of controlled companies, interchanging equipment among the various lines and furnishing equipment as might be required to meet

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from time to time the varying requirements of particular lines, supplying power and using power houses, car barns and stations as seemed best for the effective and economical operation of the system as a whole, and also establishing a system of transfers between various lines and routes; that the defendant owns equipment to a substantial amount, which has been used over the system as varying requirements of operation made necessary, without assignment to any particular line or lines; and the plaintiff is informed and believes that many of the
3275 leased lines in defendant's system are without adequate equipment of their own; and that in many cases the motive power employed on leased lines or lines of controlled companies has been changed to electricity without supplying said lines with independent power houses or other independent sources of supply of power, leaving such lines dependent for power on other lines of the system.

EIGHTH.—That the defendant is indebted to the plaintiff in the sum of Thirty-six Thousand Eight Hundred and Six and 26/100 ($36,806.26) for
3276 brake shoes and miscellaneous castings furnished and supplied by plaintiff to the defendant, at the request of the defendant, and for which the defendant agreed to pay plaintiff said sum of Thirty-six Thousand Eight Hundred and Six and 26/100 Dollars ($36,806.26), and payment of said sum has been duly demanded by plaintiff from the defendant and payment thereof refused, and the same is now wholly due and unpaid; that said material was so supplied to the defendant for the purposes of the operation of its street railway system and to enable the defendant to comply with and fulfill the

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duty towards the public which the defendant, as well as the respective lessors of the defendant, owed to the public, and to discharge its and their obligations respectively under the franchises for the operation of their respective lines, and were used for the purposes aforesaid.

NINTH.—On information and belief, that since entering into possession of the premises the defendant has expended large sums, aggregating more than Three Million Dollars ($3,000,000), in making improvements and additions and other capital 3278
expenditures to and upon lines of its system, including its leased lines, and that said expenditure has greatly benefited such lines of railroad and the value of said leased properties, but that the defendant has no further resources for any further expenditures that may be needed; that the defendant has been required, and will be required, to make large expenditures for the maintenance and repair of its system, and that the defendant will be unable to pay therefor, although immediately necessary for the operation of its lines; that in the course of the operation of its lines numerous ac- 3279
cidents have occurred, in respect of which suits have been brought and are now pending, and that said suits to the number of several thousand are now upon the calendars of the courts awaiting trial, and that the defendant will be without means to meet judgments recovered in said suits; that there is a suit upon the calendar of this court growing out of the reorganization of the Metropolitan Street Railway Company in which it is claimed that the defendant is liable for upwards of One Million Dollars ($1,000,000), and the de-

3280 fendant will be without means to meet any judgment recovered thereon.

TENTH.—That plaintiff is informed by the officers of the defendant and believes that the defendant has outstanding floating indebtedness for materials, equipment, taxes, rentals and supplies furnished, to the amount of upwards of One Million Six Hundred Thousand Dollars ($1,600,000); that said floating indebtedness is now overdue; that the defendant is unable to pay the same, and
3281 that the holders thereof are pressing for payment thereof; that some of said creditors may bring suits in respect of their said claims, and may levy execution on the lines of railroad owned by the defendant and on the material and supplies and other property of the defendant on hand and kept by the defendant for necessary use in operating said railway system, and plaintiff alleges that there is grave danger that the lines of the defendant may no longer be operated in a single system, but the various lines which are now owned or leased by the defendant may be broken up and be separately
3282 operated; that there is likewise grave danger that suits may be instituted against the defendant in respect of the claims above stated; and that it is essential to the interest of the public and to plaintiff that the property of the defendant should not be sacrificed; that the position of defendant is the more acute by reason of the present bad financial situation of public service corporations generally; that there are outstanding unpaid special franchise taxes for the year 1900 against the property of defendant and certain of the lessors, which with interest claimed to be due thereon, amount to ap-

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proximately Five Hundred Thousand Dollars ($500,000); that such taxes constitute liens upon the special franchises of the companies affected, and that there is likelihood of steps being taken by the officers of the City of New York to sell such liens in the manner provided by law; that for the fiscal year ending June 30, 1918, the results from operation of defendant's system were such that the income of the year received from all sources was $153,633.87 less than the amount required to pay the interest on the First Real Estate and Refunding Mortgage 4% Bonds; that, for the six months 3284
ending December 31, 1918, the defendant's income of the period was $738,187.50 less than the amount sufficient to pay such interest; that on December 31, 1918, defendant's corporate deficit was $2,125,039.32; that all of defendant's special and reserve funds have been exhausted, and that defendant has not sufficient credit to obtain the moneys required for the operation of its properties.

ELEVENTH.—On information and belief, that the only means whereby the defendant can meet its obligations under said leases and pay its floating 3285
indebtedness and discharge its current obligations, is by the continued maintenance and operation of said system as a whole by an uninterrupted use thereof; that any suits upon or process against its properties or its revenues would seriously embarrass and cripple it, and diminish, if not destroy, its power successfully to operate said system, in the exercise of its franchises; that said system, together with all its appurtenances, rolling stock and other property connected therewith are now in a reasonably good state and condition; that during the last

3286

year the lines owned or leased by the defendant carried over Three Hundred Million (300,000,000) passengers, and the average number of persons employed by the defendant will exceed Six Thousand (6,000); that it is of vital importance to the peoples of the City of New York; that said system shall continue to be operated as a whole, and to this end it is of like importance that said system shall be preserved; that notwithstanding the fact that every effort has been made to provide funds for the payment of the indebtedness of the defendant,

3287 or for the extension of the time of payment thereof, such efforts have proved unsuccessful; that unless some definite action is taken on behalf of all the creditors so that the operation of defendant's system may be kept intact, great and severe loss will be inflicted upon all creditors; that the credit of the defendant has been seriously impaired; that it has not money to pay the debts which have matured; and has no reasonable hope of finding assistance from any quarter to enable it to do so, and that the defendant is insolvent.

Plaintiff further alleges, on information and be-

3288 lief, that unless the Court, in view of the facts above set forth, shall take said system of the defendant into judicial custody for the protection of every interest therein, that immediately upon default, individual creditors will assert their rights and remedies in different Courts; that the result will be a multiplicity of suits and a race of diligence; that attempts will be made to secure judgment and priorities; that levies will be made upon cars, rolling stock, material and supplies indispensable to the operation of the system, which will greatly interfere with, and ultimately prevent de-

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fendant from, the proper performance of its duties as a common carrier and will seriously diminish its earnings; that it will be impossible to operate the system as a whole, and the system of transfers among the lines in said system will be broken up, to the serious inconvenience of the public, and a most important and valuable property dismembered, which might be preserved by adequate judicial protection in this Court.

On information and belief, that an attempt by plaintiff to enforce at law its claims as a general creditor would precipitate similar action on the 3290
part of other creditors, and this in turn would lead to wasteful strife and controversy, which plaintiff believes can be avoided, and the property preserved for equitable distribution among those entitled thereto, only by the intervention of a Court of equity and the granting of equitable relief, including the appointment of a Receiver.

TWELFTH.—That, under these circumstances, the interferences of a Court of equity for the protection of plaintiff's rights, is imperatively required, and
especially for the timely appointment of a Re- 3291
ceiver to take charge of and preserve the property of the defendant, continue the operation of its system for the accommodation of the public, and collect and receive and properly appropriate the income thereof until the final decree of the Court in the premises.

THIRTEENTH.—In as much, therefore, as plaintiff has no adequate remedy at law for its aforesaid grievances, and can have relief only in equity, plaintiff files this bill of complaint in behalf of

3292 itself and other creditors of the defendant, who may come in and contribute to the expense hereof, and prays for equitable relief, as follows:

1. That the rights of plaintiff and of all creditors of the defendant may be ascertained and decreed, and that the Court will fully administer the fund in which plaintiff is interested, constituting the entire railroad system and other assets of the defendant, and will for such purpose marshal all the assets of the defendant and ascertain the several
3293 and respective liens and priorities existing thereon, and enforce and decree the rights, liens and equities of the creditors of the defendant, as the same may be finally ascertained and decreed by the Court.

2. That for the purpose of preserving the unity of the system of the defendant as it has been maintained and operated a Receiver may be appointed for the defendant and of all the property and assets of the defendant, real, personal and mixed, of whatsoever kind and description and wheresoever situated, including all railroads owned, leased or
3294 operated, tracks and terminal facilities, rolling stock, franchises, leases, rights and properties, with full power to sue for, collect, receive and take into his possession goods, chattels, rights, credits, moneys, effects, lands, tenements, books, papers and property and assets of every description of the defendant and with all the incidental powers ordinarily vested in Receivers in like cases and with full power and authority to operate such railroads, property and assets, and to collect and receive all the rents, issues, profits and income thereof, and to apply the same under the orders or decrees of

3295

this Court, for such period as the Court shall order, to protect and preserve the corporate franchises, privileges and property, and to preserve the corporate existence of the defendant, and to protect and preserve the said railroads, property and assets from being sacrificed under any proceedings which can or may be taken liable to prejudice or sacrifice the same, and to do any and all acts and things which may be necessary to preserve valuable rights and franchises of the defendant, or otherwise requisite or proper.

3296

3. That temporarily and pending this suit an injunction may issue against the defendant and all persons claiming and acting by, through or under it, and all other persons, to restrain them from interfering with said Receiver taking possession of said property, and that plaintiff may have such further relief in the premises as the nature of the case may require and as may be agreeable to equity.

4. That the defendant be required to answer all and singular the matters above stated.

3297

5. That a writ of subpoena may be granted to plaintiff be directed to the defendant, thereby requiring the defendant personally to be and appear on a certain day before the Court and then and there full, true, direct and perfect answer make to all and singular the premises, but not under oath; answer under oath being hereby expressly waived; and further to perform and abide by such further order, direction or decree therefor as to the Court shall seem meet.

3298

6. That plaintiff have such further and other relief as the Court may deem proper and equitable.

(Signed) GEORGE M. JUDD,
Solicitor for Plaintiff,
Office and P. O. Address,
30 Church Street,
Borough of Manhattan,
N. Y. City, N. Y.

3299

State of New York,
County of New York, } ss.:

William G. Pearce, being duly sworn, deposes and says that he is the President of The American Brake Shoe and Foundry Company, the plaintiff named in the foregoing bill of complaint; that he makes this affidavit for and in its behalf and is duly authorized so to do; that he has read the foregoing bill of complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to matters therein stated to be al-
3300 leged on information and belief, and as to those matters he believes it to be true; that the sources of deponent's knowledge and the grounds of his belief as to all matters not stated upon plaintiff's own knowledge are as follows: Deponent has made inquiries concerning the present condition of the defendant, New York Railways Company, from one or more of the principal officers of said company, and from such inquiries has obtained the

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information concerning the facts alleged in said bill of complaint upon information and belief.

(Signed) WILLIAM G. PEARCE.

Subscribed and sworn to before me
this twentieth day of March, 1919.

(sgd) E. B. SIBBALD,
Notary Public,
New York County No. 513.
Certificate filed in N. Y. Co. Register's Office
No. 9395
Commission expires March 30, 1919.
Notarial Seal.
Filed U. S. D. Ct., S. D. of N. Y., March 21, 1919.

3302

Government's Exhibit No. 110—Answer (Verified March 20, 1919).

IN THE

DISTRICT COURT OF THE UNITED STATES,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

3303

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Plaintiff, against NEW YORK RAILWAYS COMPANY, Defendant.	In Equity.

NEW YORK RAILWAYS COMPANY, the defendant in this case, for answer to the bill of com-

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plaint herein, or unto so much and such parts thereof as the defendant is advised it is necessary or material for this defendant to make answer unto, answering, says:

FIRST.—The defendant admits all the allegations of said bill of complaint.

SECOND.—The defendant, reiterating the admissions of the preceding article of this answer, joins in the prayer of said bill of complaint and prays

3305 that this Court, sitting in equity, may take possession of the system of the defendant through the appointment of a Receiver as prayed in said bill of complaint and thereby preserve the unity of the system of the defendant as it has been maintained and operated and protect and preserve the corporate franchises, privileges and property and preserve the corporate existence of the defendant and protect and preserve its said system and its said property, real and personal, from being sacrificed under any proceedings which can or may be taken, liable to prejudice or sacrifice the same, and do any and all acts which may be necessary to

3306 preserve the valuable rights and franchises of the defendant, and it accordingly prays that inasmuch as there is no adequate remedy at law in the premises for the plaintiff or for this defendant, that this Court will, for the purposes aforesaid, appoint a Receiver as prayed for in said bill of complaint, and empower and authorize such Receiver to take possession of the entire property of this defendant and to preserve, manage, operate and control the same, pay all indebtedness due or to become due by this defendant, and otherwise discharge all the

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duties ordinarily imposed by the Courts upon Receivers in similar cases; that on the final hearing in this cause this Court will, under said bill of complaint and this answer, or such supplemental bill as shall be filed therein, make such decree or decrees with respect to the property of this defendant as shall deal with the same on general equitable principles, and that this Court will cause all the liens upon said property, or any part thereof, and all rights and claims in equity of persons interested therein, to be ascertained, defined and determined, and that the proceeds arising from the sale of said 3308
property, or any part thereof, be applied under the said orders or decrees of this Court according to the rights, interests and equities of the parties interested therein, and that this Court will direct all persons in possession of the property of this defendant, or any part thereof, to surrender the same to such Receiver or to hold such property under said Receiver.

J. L. QUACKENBUSH,
Solicitor for Defendant.

3309

RICHARD REID ROGERS,
Of Counsel.

Southern District of New York,
State of New York,
County of New York, } ss.:

Theodore P. Shonts, being duly sworn, doth depose and say that he is the President of the New

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York Railways Company, the defendant in this suit; that he has read the foregoing answer to the bill of complaint in this suit and knows the contents thereof, and that the same is true to his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

THEODORE P. SHONTS.

Sworn to before me this
3311 20 day of March, 1919.

J. C. NORRIS,
Notary Public,
Nassau County.
(Notarial Seal.)
Certificate filed in New York County No. 89.
N. Y. County Register's Office No. 9070.
Term expires March 30, 1919.
(Filed U. S. D. Ct., S. D. of N. Y., March 21, 1919.)

3312

Government's Exhibit No. 111—Order Appointing Temporary Receiver. 3313

IN THE

DISTRICT COURT OF THE UNITED STATES,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Plaintiff, against NEW YORK RAILWAYS COMPANY, Defendant.	In Equity. 3314

And now on this 20th day of March, 1919, this cause came on to be heard upon the bill of complaint and on the answer of the defendant thereto this day filed, upon motion for the appointment of a Receiver, and after hearing George M. Judd, Esq., for the plaintiff, and James L. Quackenbush, Esq., for the defendant, and after due deliberation, the Court 3315 being fully advised in the premises,

It is ORDERED, ADJUDGED AND DECREED, that Job E. Hedges, of the City of New York, be and he hereby is appointed temporary Receiver of the defendant New York Railways Company, and of all the property and assets of the said defendant real, personal and mixed of whatsoever kind and description and wheresoever situated, including all railroads, owned, leased or operated by said defendant, all tracks, terminal

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facilities, offices, shops and all buildings and appurtenances of every kind, all cars and other rolling stock and equipment, tools, machinery, furniture, fixtures, materials and supplies, books of account, and other books, papers and accounts, cash in bank, on deposit and in hand, money, debts, things in action, credits, stocks, bonds, evidences of indebtedness, securities, deeds, leases, contracts, muniments of title, bills receivable, rents, issues, profit and income accruing and to accrue as well as all interest, easements, privileges and franchises and

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all assets of every kind, character and description of the defendant herein; that the said Receiver be, and he hereby is, authorized immediately to take possession of the same and to run, manage and operate the said railroads, properties and assets in such manner as will in his judgment produce most satisfactory results so that the operation of the railroad system of the defendant shall be continued in the same manner as at present and the public duties obligatory upon the defendant be in all respects discharged, and to exercise the authority and franchises of defendant and discharge

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its public duties and to preserve and protect its said system, properties and assets in proper condition and repair and to protect the title and possession and secure and develop the business of the same, and in his discretion to employ and discharge and fix the compensation of all officers, attorneys, managers, superintendents, agents and employees, and to make such payments and disbursements as may be needful and proper in so doing; that the said Receiver be, and he hereby is, authorized to collect and receive the rents, income, tolls and profits of the said railroads, properties and

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assets, and to make appropriate payments therefrom on account of accruing rents and other necessary charges, and he shall have power to redeem any and all securities of the defendant now pledged as security on loans of money, and shall have power to borrow money if needful in his judgment in order to comply with this direction, and also, so far as may be needful to meet current requirements for labor, materials and supplies, but for no other purpose without the further order of this Court: and the said Receiver is hereby fully authorized and empowered to institute and prosecute all 3320
such suits as may be necessary in his judgment for the proper protection of the property and trust hereby reposed in him and likewise to defend all actions instituted against him as Receiver, and also to appear in and conduct the prosecution or defense of any suits now pending in any court against the defendant, the prosecution and defense of which will in the judgment of said Receiver be necessary for the proper protection of the property placed in his charge, or the interests and rights of creditors connected therewith; and the said Receiver is hereby authorized in his discretion from 3321
time to time, out of the funds coming into his hands, to pay the expenses of operating the said properties and executing his trusts, and all taxes and assessments upon the said properties or any part thereof, and all such rentals and installments as may fall or become due for the use of any portion of said railroads and other property; and also to pay and discharge all claims arising from the previous operation of said properties as in his judgment on examination are proper to be paid as expenses of operation and the current and unpaid payrolls and

3322 vouchers and supply accounts incurred in the operation of said railroad system at any time within four months prior hereto. The said Receiver is hereby required to open proper books of account, wherein shall be stated the earnings, expenses, receipts and disbursements of his said trust, and preserve proper vouchers for all payments by him made on account thereof.

And it is further ordered, that the bond of the said Receiver in the sum of One hundred thousand dollars, conditioned that he will and truly perform
3323 the duties of his office and duly account for all moneys or property which may come into his hands, and abide by and perform all things which he shall be directed to do, with sufficient sureties, to be approved of by a judge of this Court, be forthwith filed in the office of the Clerk of this Court;

And it is further ordered that the defendant, said New York Railways Company, and each and every of its officers, directors, agents and employees and all other persons whomsoever, be and they are hereby required and commanded forthwith, upon demand of the said Receiver, or his duly authorized
3324 agent, to turn over and deliver to said Receiver, or his duly constituted representative, any and all books of account, vouchers, papers, deeds, leases, contracts, bills, notes, accounts, moneys or other property in his or in their hands or under his or their control, and each of said directors, officers, agents and employees is hereby commended and required to obey and perform such orders as may be given to them from time to time by the said Receiver or his duly constituted representative, in conducting the operation of the said system, properties and assets, and in discharging his duties as Receiver.

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And the defendant, said New York Railways Company, and its officers, directors, agents and employees, and all other persons claiming to act by, through or under the defendant and all other persons whomsoever are hereby enjoined from interfering in any way whatever with the possession or management of any part of the property over which the Receiver is hereby appointed or interfering in any way to prevent the discharge of his duties or his operation of the same, and any party in interest may apply for further direction.

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And it is further ordered that the parties hereto show cause before this Court at Room 235 at the United States Post Office Building in the City of New York on the 31 day of March, 1919, at 4 o'clock in the afternoon, why the said receivership should not be continued during the pendency of this suit and upon the hearing thereon any other creditor of the defendant or other party in interest may be heard.

Dated, New York, March 20, 1919.

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JULIUS M. MAYER,
United States District Judge.

(Filed U. S. D. Ct., S. D. of N. Y., March 21, 1919.)

3328 **Government's Exhibit No. 113—Stenographer's Minutes on Return of Order to Show Cause Why Receivership Should Not be Continued.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

Before—Hon. JULIUS M. MAYER, J.

3329 THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,
Plaintiff,

vs.

NEW YORK RAILWAYS COMPANY,
Defendant.

New York, March 31, 1919.

APPEARANCES:

3330 GEORGE M. JUDD, Solicitor for Plaintiff.

JAMES L. QUACKENBUSH, Solicitor for Defendant; Ralph Norton, Richard Reid Rogers, of Counsel.

WILLIAM P. BURR, Corporation Counsel, Solicitor for the City of New York; Edgar J. Kohler, of Counsel.

MURRAY, PRENTICE & HOWLAND, Solicitors for Five Per Cent. Bondholders' Committee; Charles P. Howland, A. L. Obre, of Counsel.

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RUSHMORE, BISBEE & STERN, Solicitors for Protective Committee of the Stock of the Interborough Consolidated Corporation; Alfred E. Mudge, of Counsel.

McADOO, COTTON & FRANKLIN, Solicitors for Four Per Cent. Bondholders' Committee; Joseph P. Cotton, of Counsel.

WILLIAM J. GRIFFIN, Solicitor for National Surety Company; also present, but not appearing of record.

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MARK HYMAN for the Bondholders of Fulton Street Railroad Company.

CRAVATH & HENDERSON (by Robert T. Swaine), for Interborough-Metropolitan Four and a Half Per Cent. Bondholders' Committee.

SAMUEL SEABURY, JOHN V. BOUVIER, ROBERT H. EARNEST, CHARLES STECKLER, for Tort Committee, etc.

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The Court: The question is on the return of the order to show cause.

Mr. Judd: I desire to present an order, if your Honor please, continuing the receivership.

The Court: Does anyone desire to be heard? The Corporation Counsel?

Mr. Burr: Your Honor, I am here to aid the Court with whatever suggestion or information I am able to supply that will be helpful in properly administering this receivership, if it is to be continued.

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The plaintiff in its complaint expresses its desire through this receivership to preserve the unity of the property as it is at present maintained, and the defendant admits that the receivership is necessary for that very purpose, and I am here to ask and to urge your Honor not only to preserve the property and the railway system as it is at present maintained, in the interest of the creditors, but also to maintain the present system of compulsory free transfers in the interest of the public.

I submit an affidavit here. The City is not only
3335 a creditor to the extent of about a million dollars, but, as you know, it is also the grantor of the various franchises under which this defendant company and its subsidiary companies, or controlled companies, are being operated. I have presented to your Honor a list of such franchises, such lists not being entirely exclusive or inclusive of all the franchises granted, and I will ask the privilege later on of submitting to your Honor, to guide and aid the Receiver, a graphic chart showing the franchises granted by the City in which free transfers are provided.

3336 The fact is that the transfers are not only provided for by the franchises themselves, but they are also provided for by the Railroad Law. Since the receivership of the Metropolitan Street Railway Company in 1907 the law regulating these matters has been changed, because of the things which came to light and were developed in that receivership.

The Receiver, of course, immediately will be confronted with demands for the termination of various leases under which this system is being operated. The New York Railways Company today pays in rentals $1,936,000. That rental is made up of guaranteed payments upon the stock of the

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various companies whose railroads it acquired or leased, in some instances as high as 26 per cent.

It will be necessary for the Receiver immediately to give his attention to the question as to whether a scaling down of these rentals will not be sufficient to preserve the unity of this property without any disintegration whatsoever.

The object of the Court, I take it, will be to conserve this property, as Judge Peckham said in the Metropolitan case, to conserve it quickly, though in that case it took four years.

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The statute now provides that where there is a question of transfers an application must be made to the Public Service Commission, and the Public Service Commission has full power and authority, under Section 49, I think it is, Subdivisions 3 and 7, to take testimony and to provide by its decree or certificate for the proper regulation of these railroads in that regard.

Not only that, but it has the power to fix joint rates if even the leases are terminated, because of the necessities of the lessors for their money.

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What I desire to recommend to your Honor in the interest of the City, and in the interest of the creditors, and in the interest of this company, is that your Honor at once take steps to have the Receiver acquainted, through a public hearing conducted before your Honor, with all the facts with regard to that situation, so that you may be fully apprised and fully advised as to what measures later on you may deem it prudent and necessary to take for the purpose of conserving and preserving and not disintegrating this property.

It was with that in mind that I submitted this morning, appearing specially for the City, this

3340 affidavit containing such information as I think will be helpful and useful to the Court.

Mr. Griffin: If your Honor please, I appear for the National Surety Company, the surety on a number of undertakings on appeal for the New York Railways Company.

I appear for the purpose of asking the assistance of your Honor in having inserted in the order appointing the Receiver, or Permanent Receiver, or continuing this receivership, a provision permitting the Receiver to compromise and to settle claims,
3341 and to make such arrangements with regard to bonds to be required on appeals which the Receiver may take, as may be necessary, and to arrange for the payment of premiums on the bonds furnished on those appeals.

I have authority, if your Honor please, for making that request, and I attach to the papers which I have and will file with you the action taken by the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, in the case of the Railway Steel Spring Company vs. The Missouri, Kansas & Texas Rail-
3342 way Company, where the Court inserted in the order appointing the Permanent Receiver language reading as follows, after giving him directions as to the payment of moneys for the expenses of operation. He then provided:

> "All amounts now or hereafter paid by sureties upon all supersedeas or appeal bonds executed by said sureties without security for the benefit of the defendant Railway Company"

shall be paid,

> "and said Receiver be and he is hereby authorized to execute, in his own name or that of the

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defendant Railroad Company, all necessary appeal, supersedeas, injunction or other bonds which may be required by law or in carrying out this order or any other order of this Court, and to that end, enter into contracts with Surety Companies as sureties on such appeal, supersedeas, injunction or other bonds, and to pay from any funds coming into his hands as Receiver, the reasonable charges of such Surety Companies therefor, as well as any amount they may be required to pay by reason of signing such bonds as surety."

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In the District Court for the Northern District of Illinois, before Judge Carpenter, in the case of The American Steel Foundries Company vs. The Chicago, Rock Island & Pacific Railway Company, a supplementary order was entered by Judge Carpenter there, which reads:

"That the Receivers heretofore appointed by the Court be, and they hereby are, authorized and directed to compromise and settle any action or proceedings or suits now pending or which may hereafter be brought in any court or before any officer, department, commission or tribunal, and to make all necessary payments in compromise of such suits or proceedings, which in the judgment of the Receivers may be for the benefit or advantage of the property in their possession as such Receivers.

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3. That said Receivers be, and they hereby are, authorized in their discretion to compromise, settle or pay, out of the funds from time to time coming into their possession as Re-

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ceivers, all claims against the Railway Company for services rendered or on account of liability for loans, damage or injury, either as to person or property, which might become, through judgment or otherwise, a lien upon the property in their possession as such Receivers."

The National Surety Company, during the year 1918, and up to early in 1919, executed various bonds, and at the time that your Honor appointed
3347 the Temporary Receiver here the National Surety Company was liable and is to-day liable for $127,678.44 on about twenty-four bonds executed on appeals taken to the Appellate Division, the Appellate Term, on various judgments rendered against the company.

The affidavit which the National Surety Company has made has set forth these various facts, and requests that your Honor have inserted in the order a provision reading as follows—that is, the order continuing the receivership:

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"And the said Receiver is hereby directed and fully authorized and empowered to compromise and settle any claims, actions, proceedings or suits now pending and to pay out of the funds coming into his hands all just and legal claims as well as necessary payments in compromise of such claims, actions, proceedings or suits against the New York Railways Company, whether arising or occurring before or during current operation of the railroads, or whether the same be reduced to judgment, or not; also all amounts heretofore, now

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or hereafter paid by the sureties upon all supersedeas or appeal bonds executed by said surety without security for the benefit of the railroads, and said Receiver be and he is hereby authorized and empowered to execute in his own name or that of the defendant New York Railways Company all necessary appeal, supersedeas, injunction or other bonds which may be required by law or in the carrying out of this order or any other order of this court, and to that end, enter into contracts with sureties on such appeal, supersedeas, injunction or 3350
other bonds and to pay from any funds coming into his hands as Receiver, the reasonable charges of such surety companies therefor, as well as any amounts they may be required to pay by reason of signing such bonds as surety."

It is particularly desirable, if your Honor please, that the Receiver shall have that authority, because in the experience which I know the surety companies generally have passed through there has always been more or less difficulty with the arranging of the bonds for the Receivers. 3351

This petition made by the National Surety Company shows that it has received no security for any of these bonds executed, amounting to $127,678.44.

The Court: Mr. Griffin, the situation as to surety bonds, if my memory is right, was dealt with in the Brooklyn Rapid Transit matter by way of an application by the Receiver for instructions, and I would rather not incorporate anything of that character in this order because I regard it as extraneous to this order; but the Receiver will

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take up with you on behalf of your company, the matters to which you have referred.

Mr. Griffin: Yes.

The Court: In due course such appropriate application may be made as the Receiver may be advised for consideration by the Court.

Mr. Griffin: Did these instructions, if your Honor please, include the cases which were then pending, at the time the Receiver took charge?

The Court: The instructions to the Receiver would be to visit the National Surety Company,

3353 per Mr. Griffin.

Are there any other persons desiring to be heard?

Mr. Hyman: If your Honor please, I appear for the Fulton Street Railway Company bondholders.

I do not know whether I ought to be here or not, but in the complaint filed herein as the basis of jurisdiction, there is an allegation that there is pending upon the calendar of this Court a suit growing out of the reorganization of the Metropolitan Street Railway Company, in which it is claimed that the defendant is liable for upwards of one million dollars, and the defendant will be without

3354 means to meet any judgment recovered therein.

I assume that is the suit by the Fulton Street Bondholders' Committee against the New York Railways Company arising out of the former receivership; and with your Honor's permission I would like simply to make a statement at this time without entering a formal appearance, as possible there is a conflict of jurisdiction between the Court under the old receivership proceeding and the present court in regard to this claim.

In the old receivership proceeding the Court reserved jurisdiction over the property sold under

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the foreclosure, and over the cash fund of some six million dollars, to determine the rights of creditors and claimants therein, with the right to take possession, to enforce any decree or order it might make in the premises.

Pursuant to that leave, the Fulton Street Bondholders having a claim of $500,000 and accrued interest, filed a suit in this court to impress a lien upon the property under foreclosure, and also upon this so-called six million-dollar cash fund that was transferred to the New York Railways Company a couple of years ago.

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This suit was attacked both on the ground of jurisdiction and on the ground of the equity of the bill, and Judge Manton last year wrote a very elaborate opinion sustaining the suit.

Consequently it is the claim of the Fulton Street Bondholders that they have granted to them a reserved lien upon the present property, including the six million-dollar cash fund; and that that lien, having attached under the prior jurisdiction of this Court, would be sperior to the rights of the Receiver under the present receivership.

Consequently my sole purpose of coming here is 3357
to advise your Honor of the present situation of that suit, and to suggest, if it be possible, that in your order some account be taken of this possible conflict of jurisdiction, so that no order made continuing the receivership would jeopardize or prejudice the reserved jurisdiction of the Court under the prior receivership orders.

This claim of the Fulton Street Bondholders is that the Metropolitan Street Railway Company had guaranteed the principal and interest of this bond issue, and had operated this Fulton Company

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practically as its own, and under the reorganization no consideration was given to this bond issue, they got back no property, no equipment, no road bed and no franchises, nor were they taken care of in the reorganization.

In consequence thereof the claim is made that these Fulton bonds, amounting to $500,000 and interest, constitute a lien upon the property transferred through the receivership proceedings; and we would like to have such order made, if it is possible, so that nothing will be done herein which

3359 will prejudice or interfere with the reserved jurisdiction of the Court in the prior suits.

If your Honor would so desire, I would like to submit a form of reservation of jurisdiction which I think would answer our purpose, if it be satisfactory to the other side.

The Court: I think we can deal with that at the moment a little more simply. At the conclusion of the proposed order that Mr. Judd has just handed up, there is the following:

> "It is further ordered that any party in in-

3360 terest may apply for further direction."

I have changed that to read:

> "It is further ordered that any party in interest may apply at any time for further direction, and for that purpose the term of the court is hereby extended."

I do not want to pass at this time, either one way or the other, upon your application; but the minutes which record the colloquial statements that are being made will note that I do not pass on

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that matter at this time, either one way or the other, and that either you may make an appropriate motion, when so advised, at any time hereafter, or that the Receiver when he investigates the matter, may make such application as he may be advised; and at your joint convenience you can confer with the Receiver and with such counsel as he may select.

In the meanwhile I will be glad to have your memorandum for my own information.

Mr. Hyman: I returned this afternoon so I have a fragmentary memorandum.

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The Court: That will be perfectly satisfactory.

Mr. Hyman: My remarks may be without appearance on my behalf?

The Court: Certainly. Are there any others who desire to be heard?

Mr. Bouvier: May it please the Court, at the request of a large number of members of the bar representing claimants against the New York Railways Company in a very considerable sum of money, for the formation of a committee in its nature and scope not dissimilar to that which exists with respect to the Brooklyn Rapid Transit Company, there has been pursuant to that request formed a committee consisting of Judge Seabury as Chairman thereof, myself, Mr. Ernest, and Mr. Charles Steckler; and if it meet with the Court's approval I should like the Court to direct that there shall be duly noted on its records the formation of that committee, and that all notices and other papers in the proceeding shall be served upon the Secretary of that Committee.

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The Court: That is Mr. Ernest?

Mr. Bouvier: Yes, sir.

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The Court: And his address is what?

Mr. Bouvier: 38 Park Row.

The Court: Are there any others who desire to be heard?

If not, I will sign the order which has been presented, with the slight change that I have indicated, which is purely one of form, making the appointment of Mr. Hedges permanent pending the litigation.

In addition to the various committees which appeared before me at the time of the application

3365 for the original order, the Corporation Counsel, and the committee to which Mr. Bouvier has referred, have appeared to-day.

In respect of all these committees and of the Corporation Counsel, and of the committee of which Judge Seabury is chairman, the Tort Committee, the Receiver and such counsel as he may select, are instructed to give notice of all proceedings, exactly in the same manner as in accordance with the established practice in the proceedings of the case of the Brooklyn Rapid Transit Company.

I am extremely glad, I am very much gratified

3366 at the attitude of the Corporation Counsel in desiring to assist the Court and the receivership, and all those concerned, in a spirit of co-operation and of constructive effort, in the many problems which are now and doubtless will hereafter be presented to this receivership; and it may not be inappropriate at this time, in view of the fact that two extensive systems are now in the hands of the Court, and that a third company, having to do more particularly with financial matters, is also in the hands of the Court, that the Court might point out briefly some matters to which attention should be directed.

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Without attempting to be accurate, I should say that the matters in hand may be divided into what, for want of a better definition, we might call the legal situation, the traffic situation and the financial situation.

The members of the bar here present and the Court perfectly understand what is frequently understood by laymen, and that is that the matters which ordinarily require first consideration and careful investigation are those matters that revolve around the more or less complicated legal rights which arise in every situation of the character 3368
here disclosed, or of the character disclosed in the case of the Brooklyn Rapid Transit System.

There are security holders of various classes, there are those who hold the stock, there are the creditors. In the transit situation in Brooklyn there is a contract with the City, and various franchise relationships; and in this situation of the New York Railway Company there are various contract relationships in respect of franchise matters.

These all require for a clear understanding the most careful consideration by able and thorough 3369
counsel. The Receiver of course must acquaint himself with these legal problems, or problems of law, as fast as he can, and be aided by competent and highly skilled counsel. In that connection I assume that all counsel, while naturally safeguarding the rights of the interests they represent, will nevertheless fully co-operate with the receiver in endeavoring to make the situations as to the law as clear as possible, so far at least as a statement of what the controversies are is concerned.

I shall be glad indeed to have the assistance not only of counsel who represent the security holders

3370 and the stockholders and any other interests, but also shall welcome the co-operation of the Corporation Counsel and of the Public Service Commission, and shall hope that they will give us their co-operation to the fullest extent.

The second head is the traffic situation. In the situation in Brooklyn we were met at the outset with a considerable amount of dissatisfaction on the part of the public at large with the actual running of the trains and all there was connected therewith.

3371 The Receiver there has devoted himself assiduously to correcting the situation which was first presented, as far as he could. He does not consider that he has attained perfection, and I doubt whether that can ever be attained; but his effort is along the line of giving the people proper transit service.

I have taken pains to endeavor to inform myself as far as I can, from independent sources—by which I mean persons disconnected in any official relation to the subject matters of the Brooklyn Rapid Transit receivership, as to whether or not

3372 that actual service is improved, and I am told by those in whom I have confidence that there has been a very substantial improvement, and every effort will be made to continue.

So in the case here, knowing the point of view of the Receiver from long years of personal acquaintance, and knowing my own point of view, I have no doubt that the Receiver will make every effort to co-operate to the end that there shall be as good a service as circumstances will permit. It is but fair to say that, so far as I have been able to learn, under the management of the officials of

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the New York Railways Company prior to the receivership, there was no substantial complaint in any quarter as to the daily running of the cars which comprise that system. Doubtless every so often there must be some complaint in so vast a system, but no such situation as to daily traffic was presented in the New York Railways situation as was presented, owing to a series of unfortunate events, in the Brooklyn situation. How good the traffic shall be, and how unified it shall be, must depend a great deal upon events and financial conditions. Nobody wants to let that traffic be any 3374
less efficient than it now is if there is any reasonable or proper way of avoiding it.

The question of transfers, to which the Corporation Counsel referred, is of course a matter of great importance and will be dealt with when the time comes, if it does come, only after the most full and careful hearing and consideration. The approach, I think, on the part of everybody, is to preserve the system and its unity if possible; and whether it is possible or not of course depends a great deal upon a number of elements, one of which is the financial situation. 3375

In respect of the financial situation, I have been extremely careful to say nothing upon the much mooted question as to increase of fares. My view of the situation as affecting the whole system, both that which is in this receivership and that which is in the Brooklyn receivership, is that the first thing to do is to get all the facts; to ascertain in a way the verity of which no one can doubt, precisely what is the financial situation, not only what the investments are—which are matters of public knowledge almost, and are on file in public

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offices—but what arrangement would be just and right to give a fair return to investors, while, on the other hand, not involving a return which is disproportionate.

All of that cannot be disposed of out of hand. That all comprises a very difficut subject matter.

In the next place it is important to know from the financial standpoint, and the point of view of expert men, the various values of these roads for all purposes. There is an investigation in hand now in respect of the Brooklyn Rapid Transit
3377 Company by expert men of the highest standing and the greatest experience. A similar investigation will no doubt be had by the receiver of this system.

When all these facts shall have been clearly known and fully understood, then it can be determined what is the right thing to do. If increase of fares on the facts should prove to be unnecessary, we shall all understand that. If increase of fares on the facts should prove to be necessary, after full and free and fair discussion, and thorough inquiry, I am convinced that the public of
3378 New York is so fair and reasonable that they will have no hesitation in making it known that if that is one of the remedies they desire, that remedy shall be adopted.

I speak not just to say some words, but I have a very real conviction, through many years of contact, that [illegible] no fairer public than that of the City of New York, but it is a public which desires to know what the facts are, and any solution of this problem, whether it be a rearrangement of the franchise arrangements as affecting the investors, or in addition or without addition

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thereto, as the case may be, an increase of fares because of increased expenses, or whatever the arrangement may be which fair-minded men will agree is right, is an arrangement that the New York public will fully ratify and support if they are satisfied that it is right.

Therefore, the great problem immediately confronting every one concerned is to make the facts clear, whatever the facts are; and then there will be an elimination of misunderstandings which arise through a failure on the part of the public to understand the facts.

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I do not know the facts, but I hope to know them before we get through.

It cannot be denied that the problem that is here concerned, that is, the so-called transit problem, is one of very great importance to the greater city, and perhaps in a way to other communities. It is a problem which requires approach in a spirit of fairness, with temperate discussion and thorough inquiry. It is a problem which invokes and invites the best judgment that can be found. It is a problem in which nothing can be ultimately accomplished unless there is a spirit of co-operation all round the circle, and understanding between all of those concerned, whether they represent the investment interests, whether they are public officials, or whether they have a duty to perform as a court. We all must understand each other, we all must assume that each is conscientiously endeavoring to approach the solution from his own point of view for the public good and for the preservation of the rights of property; and if the matter is approached in that spirit, what seems now a very difficult problem will be capable of solution.

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because I think I have lived long enough to know that there is no problem of this character that cannot be solved by fair-minded men.

It is therefore with especial pleasure that, in co-operation with the various gentlemen who represent these responsible committees which appeared before me, that I note the attitude of the Corporation Counsel of co-operation and constructive effort. If that principle is carried out by all of us, it may be our privilege to feel some day or another that we have made some contribution to a problem
3383 which concerns very deeply the welfare of the City.

I should not have said so much excepting that I thought the time had come to say something.

Is there any further business before the Court? If not, the Court will adjourn.

Certificate.

The foregoing statement of facts, including the testimony and proceedings in the contempt trial before Judge Mayer, printed herein at page 89 to and including page 820, and beginning at the middle
3384 of page 889 and ending at the middle of page 1128; which were admitted in evidence before me, is in all respects true and correct, etc., and is the whole thereof on the hearing before me and it is hereby settled and approved and it is

ORDERED that the same be filed ~~as part of~~ as a part of the record together with the exhibits therein mentioned to be transmitted to the United States Circuit Court of Appeals on the appeal in the above entitled case.

Dated, ~~April~~ March 25th, 1922.

MARTIN T. MANTON,
United States Circuit Judge.

Certification of Clerk.

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In the Matter

of

CHARLES L. CRAIG,
Petitioner-Appellee,

THOMAS D. MCCARTHY, United States Marshal,
Respondent-Appellant.

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United States of America,
Southern District of New York, } ss.:

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States of America for the Southern District of New York, do hereby certify that the foregoing ~~is~~ a volume is a correct transcript of the record in the above entitled matter ~~as agreed on by the parties.~~

IN TESTIMONY WHEREOF I have caused the seal of the said Court to be hereunto affixed at the City of New York, in the Southern District of New York, this 29th day of ~~December~~ January, in the year of our Lord One thousand nine hundred and twenty-~~one~~ two and of the Independence of the United States the One hundred and forty-~~fifth~~ sixth.

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ALEXANDER GILCHRIST, JR.,
Clerk.

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Order of Substitution.

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the Court Rooms in the Post Office Building in the City of New York, on the 25th day of January, one thousand nine hundred and twenty-two.

Present—Hon. HENRY WADE ROGERS,
" CHARLES M. HOUGH,
Circuit Judges.

3389

" LEARNED HAND,
District Judge.

In the Matter
of
CHARLES L. CRAIG,
Petitioner-Appellee,
THOMAS D. MCCARTHY, U. S. Marshal,
Respondent-Appellant.

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A motion having been made herein by counsel for the appellant for an order directing that William Hecht as United States Marshal for the Southern District of New York be substituted as appellant of record in this case in place and stead of Thomas D. McCarthy, United States Marshal, the present appellant;

Upon consideration thereof it is

ORDERED that said motion be and hereby is granted.

H. W. R.,
C. M. H.

Opinion of Henry Wade Rogers, C. J. 3391

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT.

In the Matter

of

CHARLES L. CRAIG,
Petitioner-Appellee,

3392

WILLIAM C. HECHT, United States Marshal,
Respondent-Appellant.

Before—Hon. HENRY WADE ROGERS,
" CHARLES M. HOUGH,
Circuit Judges,

and

" LEARNED HAND,
District Judge.

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JOHN P. O'BRIEN, Corporation Counsel, Attorney for Petitioner-Appellee; Edmund L. Mooney, Charles T. B. Rowe, Russell Lord Tarbox, Frank I. Tierney, of Counsel.

WILLIAM HAYWARD, United States Attorney, for Appellant; David V. Cahill, Special Assistant United States Attorney, of Counsel.

This is an appeal from an order made by one of the Circuit Judges of the Second Circuit on April 29, 1921, sustaining a writ of habeas corpus

3394 sued out in behalf of Charles L. Craig, petitioner, and discharging him from the custody of the United **[1131]** States Marshal for the Southern District of New York.

ROGERS, Circuit Judge: The petitioner, Charles L. Craig, was, during all the times herein involved, and still is the Comptroller of the City of New York as well as a member of its Board of Estimate.

It appears that on October 6, 1919, the peti-
3395 tioner Craig, as Comptroller of the City of New York, addressed a letter to the Hon. Lewis Nixon in reply to a letter which Mr. Nixon had written to the Comptroller inviting him to a conference in respect to the transportation situation in the City of New York. Mr. Craig's letter contained statements which criticised the conduct of the then District Judge Mayer who had appointed a receiver of the Brooklyn Rapid Transit Company, the New York Municipal Railway Corporation, and the New York Consolidated Railroad Company. The receiver had taken possession of the assets
3396 of these roads and was operating the railways under the instruction and supervision of the court.

The New York State Public Service Commission for the First District moved the Court for leave to intervene in the suit on behalf of the City of New York. At the same time the City of New York through its Corporaton Counsel, acting pursuant to a resolution of the Board of Estimate and Apportionment applied to the Court for the appointment of Mr. Craig as co-receiver, he being as Comptroller the chief **[1132]** financial officer of the City. The District Judge, Mayer, denied the

motion for a co-receiver at that time without prejudice to its renewal at a subsequent time. Later certain other street railway corporations were also put in the hands of the receiver.

The letter of Mr. Craig to Mr. Nixon above referred to among other things said:

> "Before any such conference can be seriously considered, and as an evidence of good faith on the part of those acting by and under the authority of United States District Judge Mayer, there must be a reversal of the policy 3398
> for which Judge Mayer is responsible, of denying to myself and other members of the Board of Estimate and Apportionment any access to original sources of information concerning the property and affairs of these various public utility corporations holding franchises to operate in the streets of New York."

Again it stated:

> "Judge Mayer refused to grant any of the relief sought by the City. He not only denied the relief but he made orders which pre- 3399
> clude any application being made by the Municipal authorities to any other Court or Judge for any right of examination into the affairs or conditions of these corporations seeking Municipal aid and favor.
>
> Truth is the mightiest weapon in every controversy. The orders of Judge Mayer deny to the Municipal authorities the opportunity to ascertain the truth."

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It concluded as follows:

> "It seems to me a monstrous thing that an order of a Federal Judge in a Court of Equity should stand between the public and the truth under such circumstances. Such an order is hostile to every interest of The City of New York in these controversies. Its operation and effect is to disarm the Municipal authorities, to deny them the most effective instrument of redress, and to force them into a con-
3401 test with corporate powers entrenched in darkness and **[1133]** concealment.
>
> The responsibility for the turmoil, delay and dissatisfaction that has followed upon the orders of Judge Mayer, denying to The City of New York any representation in these receiverships, rests upon those who procure and are protected by such orders.
>
> As a first and preliminary evidence of good faith, those who desire such a conference and a reasonable solution of existing complications, should procure the entry of orders by Judge
3402 Mayer putting The City of New York on an equal footing with the private interests active in the receiverships. A refusal to do this can but prolong and embitter the controversy; and it will not in the end procure any advantage whatever to the traction interests."

This letter Mr. Craig sent not only to Mr. Nixon but he is alleged to have caused its publication by sending it to the Public Service Commission and to the various newspapers published in the District.

The result was that the United States Attorney

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filed an information charging Mr. Craig with criminal contempt under Section 268 of the Judicial Code. The information set forth the statements in the letter which were alleged to be false, and that Craig had wilfully, knowingly, and unlawfully and contemptuously made them. It alleged that the publication was calculated and intended by him to influence the Court in the consideration of the suit in which the receiver was appointed and in proceedings then pending. It also alleged that the purpose was to intimidate the Court and to force and compel it to decide applications and **[1134]** 3404
questions in issue in accordance with Craig's wishes. It also alleged that the letter was written for the purpose of inciting public ridicule, scorn and condemnation if the Court's decisions were contrary to or at variance with the views and wishes of the defendant. That it tended to obstruct and impede the administration of justice in said suits and proceedings.

A demurrer was interposed which was overruled in an opinion which can be found in 266 Fed. 230, and the defendant was held to answer in contempt before Judge Mayer. 3405

The trial was commenced on May 10, 1920, and was concluded on June 10, 1920. Every consideration seems to have been given to counsel and briefs were not submitted until October 30, 1920, and Judge Mayer reserved his decision until February 14, 1921. He appears to have given great consideration to the questions involved, filing a full and comprehensive opinion, which can be found in

Fed . The opinion concluded as follows:

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"The United States Attorney is directed to submit to the Court, on two days' notice to counsel for defendant, a proposed order in accordance herewith which shall also provide that the defendant shall appear before the Court in Court Room 331, of the Old Post Office Building on February 24, 1921, at 2 P. M., at which time such further proceedings will be had as may be proper.

"The defendant is not only the incumbent of a high office, but is also a member of the bar
3407 of this Court. It is manifestly his duty to do all in his power to repair the wrong he has done **[1135]**.

"It is not a wrong with which the judge concerns himself in a personal sense and for that reason no personal apology is desired nor required. The wrong has been perpetrated against the administration of justice.

"The reparation which is within the power of the defendant is promptly to make and file in the office of the Clerk of the Court an unqualified retraction of the false statements re-
3408 specting the Court, referred to in paragraphs 1, 2, 3, and 4 of the information."

It seems that Mr. Craig was given full opportunity to make retraction of what the District Judge found to be "false charges," the effect of which he also found tended to "obstruct the administration of justice." But Mr. Craig did not avail himself of the opportunity to make the retraction demanded and on February 24, 1921, the United States Attorney moved for sentence and the Court pronounced judgment and sentenced the defendant to be imprisoned for a term of 60 days,,

sentence to be executed at the Essex County Jail, Newark, New Jersey, the Attorney General of the United States having previously designated that as the place of confinement for defendants sentenced in the Southern District of New York for terms of less than six months.

On the same day that sentence was pronounced an application was made to one of the Circuit Judges in this Circuit for a writ of habeas corpus and the writ was signed and issued by him on the same day. It appears that the Circuit Judge who issued the writ had been duly designated by the 3410
Senior Circuit Judge of the Circuit to hold a session of the **[1136]** District Court for the Southern District of New York for the hearing of such business as might come before him during the period between February 21, 1921, and ending March 5, 1921. Whether in awarding the writ he was acting in his capacity as a Circuit Judge or in that of District Judge under the designation referred to seems to be one of the controverted questions in the case.

The petition for the writ was addressed to the Judge as "Circuit Judge of the United States." The 3411
writ of habeas corpus required the production of the defendant before the United States Circuit Judge and is signed by the Judge who placed under his signature the letters "U. S. C. J." and nothing therein is said as to his sitting or acting as a District Judge. The first paragraph of his very comprehensive opinion which can be found in 274 Fed., 177, and which was rendered on April 29, 1921, and in which he sustained the writ and directed the defendant's discharge, was as follows:

3412 "The power of a Circuit Judge to issue a writ of habeas corpus is questioned by a motion to dismiss. I have held heretofore that a Circuit Judge has such power (In re David Lamar, 274 Fed., 160). Nothing has been submitted in this proceeding which causes me to change the views there expressed. Further, at the time of the issuance of this writ, the Circuit Judge sitting, was by assignment empowered to consider matters of original jurisdiction. The application to dismiss the writ for
3413 want of authority to issue the same is denied." **[1137]**

A Judge of the Circuit Court of Appeals is, in our opinion, without power either to grant or to issue a writ of habeas corpus. The Circuit Court of Appeals is a court created by statute and is not endowed with any original jurisdiction. It was established by the Act of March 3, 1891, 26 St. at L. Ch., 517, page 826. It is only a court of appeal. The Act does not in terms grant to this court authority to issue the writ. It is given authority to
3414 "exercise appellate jurisdiction to review by appeal or by writ of error final decision in the district court and the existing circuit courts in all cases." And the Supreme Court has held that a Circuit Court of Appeals is not authorized to issue original and independent writs of habeas corpus. Whitney vs. Dick, 202 U. S., 132, 137.

If the Circuit Court of Appeals, as such, is without the power is it possessed by a Judge of the court acting solely as such? We are satisfied that he does not possess it. A Judge of the Circuit Court of Appeals, like the Court itself, has no authority except that conferred by statute. And no act of Congress

empowers him to grant or to issue a writ of habeas corpus. Section 751 of the Revised Statutes provides:

> "The Supreme Court and the Circuit and District Courts shall have power to issue writs of habeas corpus." **[1138]**

And Section 752 provides:

> "The several justices and judges of the said courts, within their respective jurisdictions, 3416
> shall have power to grant writs of habeas corpus for the purpose of an inquiry into the cause of restraint of liberty."

The Circuit Courts, referred to in Section 751, were the Circuit Courts established by the Judiciary Act of September 24, 1789, and which were abolished by the Act of March 3, 1911. 36 St. at L. Ch., 231, Sec. 289 (p.) 1167.

The Judges embraced within the language of Section 752 were from 1789 to 1869 the Circuit Justices of the Supreme Court assigned to hold 3417
the Circuit Courts and Judges of the District Court. By Section 2 of the Act of April 10, 1869, the office of Circuit Judge was created, 16 St. at L. (p.) 44, and that Act conferred on the Circuit Judge for his Circuit the same power and jurisdiction therein as the Justice of the Supreme Court alloted to the Circuit. And Section 607 of the Revised Statutes conferred similar authority in the same language, which continued in force until repealed in explicit terms by the Act of March 4, 1911, already referred to and which transferred the powers of the Circuit Court to the District

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Court. The Circuit Court and the Circuit Court of Appeals were two absolutely distinct courts, and a Judge of the Circuit Court and a Judge of the Circuit Court of Appeals were equally distinct. And **[1139]** a Judge of the Circuit Court of Appeals, as such, has never been invested with the power to grant a writ of habeas corpus which was possessed by a Judge of the Circuit Court. And no one of the Judges now constituting the Circuit Court of Appeals is now or ever has been a Judge of the Circuit Court within the meaning of
3419 Section 752 of the Revised Statutes, and no one of them is possessed of the power to grant writs of habeas corpus.

But while a Judge of the Circuit Court of Appeals as such has no power to issue the writ of habeas corpus, a Judge of the District Court has such power by virtue of Sections 751 and 752 of the Revised Statutes hereinbefore set forth. As the Judge when he issued the writ, so called, and granted the discharge had been designated and appointed under Section 18 of the Judicial Code to hold a session of the District Court for the
3420 Southern District of New York for the hearing and disposition of such business as might come before him within the period specified in his appointment, it is clear that he had power to grant a writ of habeas corpus at the time he acted in this matter —provided he acted as a District Judge. As he had jurisdiction sitting as a District Judge and was without jurisdiction if sitting as a Circuit Judge the presumption is that he, in doing what he did, was sitting as a District Judge unless it clearly **[1140]** appears to the contrary. The statement of his belief in the opinion which he filed that he possessed the power to act in his capa-

city as a Circuit Judge is not of controlling significance. Particularly is this so because he also, in the same connection, refers to the fact that in the issuance of the writ he had been empowered to consider matters of original jurisdiction. Whatever doubt one might otherwise entertain as to the capacity in which he was acting at the time seems to be put at rest by the order which he made and which required "that the papers in this proceeding be filed with the Clerk of the United States District Court for the Southern District of New York," and that they "be recorded in said court." As a Judge of the Circuit Court of Appeals he would not have directed the papers to be filed with the Clerk of the District Court and that they be recorded in that Court, but would have filed them in the office of the Clerk of his own court and ordered them to be there recorded. The order sustaining the writ and ordering the discharge of Craig, and which the Judge ordered recorded in the District Court and which is the order appealed from must be regarded as made by him under his designation to hold the District Court for the Southern District of New York. And as such an appeal from that order was properly taken to this court **[1141]**.

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Before we pass to a consideration of the merits of the case itself we deem it proper to refer to what appears in the transcript under the designation "Writ of Habeas Corpus" but which in reality does not correspond with what we understand to be such a writ. In commenting upon the writ as printed in the present record it is necessary to have in mind the language of Sections 751 and 752 already quoted, and to note the distinction made therein between the power to issue and the

3424 power to grant. Section 751 gives to the *courts* named therein the power to *issue* the writ. And Section 752 gives to the *Judges* of the courts specified the power to *grant* the writ. To grant the writ is to give permission for its issuance. When that permission is given it issues from the court. And when so issued it has the teste of the Clerk as well as the seal of the court. But in the case now before us this so-called writ of habeas corpus does not appear to have issued from any court. No seal of any court is affixed to it. And the
3425 name of the Clerk of no court attests it. The Statute of 31 Car., II, expressly provided that the writ should be under the seal of the court whereof the Judge granting the writ is a member. It is our understanding that a writ of habeas corpus like a writ of error, or a writ of certiorari or a writ of mandamus should be issued under the seal of the court **[1142]**. In the United States the writ always runs in the Federal courts in the name of the President of the United States, and in the State courts in the name of the State or the people. Church on Habeas Corpus (2nd
3426 ed.) Section 110. But in this case the writ did not run either in the name of the President or in that of anybody else. And it was not addressed to the United States Marshal or to anybody else. We, however, do not need now to inquire as to what legal validity the writ originally possessed as it appears to have been treated by all the parties as valid, and no objection was raised concerning it at the argument in this court.

This brings us to inquire as to the use made of the writ of habeas corpus. The object of that writ is to secure the speedy release by judicial decree of persons who are illegally restrained of their

liberty. The writ has long been justly esteemed the great bulwark of personal liberty, since it is the proper remedy to ascertain whether the individual is lawfully deprived of his liberty, and by its means, if no lawful ground of his detention appears, he is entitled to an immediate discharge. In this case the petitioner for the writ had been convicted of a criminal offense, a criminal contempt, and sentenced to imprisonment. He sought to obtain his release and to defeat his conviction and sentence by means of a writ of habeas corpus.

In the important case of Brass Crosby, Lord Mayor of London, 3 Wilson, 188, an application **[1143]** was made in 1771 to the Court of Common Pleas for a writ of habeas corpus to bring up the body of the Lord Mayor of London who had been committed for contempt by the House of Commons. The habeas corpus was granted, and upon the return, the causes of contempt for which the party was committed, were set forth. It was fully argued and at considerable length that the House of Commons had no authority to commit for a contempt; and if they had that power that they had used it wrongfully in that instance and that the causes assigned were insufficient. The whole court decided that the House of Commons had power to commit for contempt; and that the court could not revise its adjudication.[1] Lord Chief Justice,

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[1] In Kilbourn vs. Thompson, 103 U. S., 168, the Supreme Court, which was an action for false imprisonment, considered the power of the Houses of Congress to punish for contempt and pointed out the distinction between the Houses of the English Parliament and the Houses of Congress in this respect. See also Marshall vs. Gordon, 243 U. S., 521 **[1144]**.

3430 De Grey, at the conclusion of the argument stated that if either he or any of his brethren on the Bench, had any doubt about the matter they would certainly have taken time to consider before giving their opinions, but that the case seemed so very clear that there was no reason for delay and they thereupon proceeded to state their opinions. The Chief Justice stated his opinion at some length and in the course of it declared that "when the House of Commons adjudged anything to be a contempt, or a breach of
3431 privilege their adjudication is a conviction and their commitment, in consequence, is execution; and no court can discharge on bail, a person that is in execution by the judgment of any other court. The House of Commons, therefore, having an authority to commit, and that commitment being an execution, what can this court do? *It can do nothing, when a person is in execution by the judgment of a court having a competent jurisdiction.* In such a case, this Court is not a court of appeal." All four of the Justices agreed and Mr. Justice Blackstone, in his concurring opinion, said "all
3432 courts, by which I mean to include the two Houses of Parliament, and the Courts of Westminister Hall, can have no control in matters of contempt. The sole adjudication of contempt, and the punishment thereof, belongs exclusively, and without interfering, to each respective court. Infinite confusion and disorder would follow, if courts could, by writs of habeas corpus, examine and determine the contempt of others."

The above case was approvingly commented upon and its doctrine followed in 1822 by the Supreme Court in Ex parte Kearney, 7 Wheat., 38.

The Court **[1145]** in its opinion, which was written by Mr. Justice Story, after referring to the Brass Crosby case, said:

> "So that it is most manifest, from the whole reasoning of the Court in this case, that, a writ of habeas corpus was not deemed a proper remedy, where a party was committed for a contempt by a court of competent jurisdiction; and that, if granted, the Court could not inquire into the sufficiency of the cause of commitment." 3434

Again: "The only objection is, not that the Court acted beyond its jurisdiction, but that it erred in its judgment of the law applicable to the case." This the Court decided it could do and it denied the writ.

In 1830 in Ex parte Tobias Watkins, 3 Peters 193, the Supreme Court refused an application for a writ of habeas corpus, it appearing that the prisoner was confined in jail by virtue of a judgment of a Circuit Court of the United States which judgment was claimed to be erroneous. Chief Justice Marshall, speaking for the Court, said: 3435

> "An imprisonment under a judgment cannot be unlawful, unless that judgment be an absolute nullity; and it is not a nullity if the Court has general jurisdiction of the subject, although it should be erroneous. The Circuit Court for the District of Columbia is a Court of record, having general jurisdiction over criminal cases. An offence cognizable in any Court, is cognizable in that Court. If the offence be punished by law, that Court is com

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petent to inflict the punishment. The judgment of such a tribunal has all the obligation **[1146]** which the judgment of any tribunal can have. To determine whether the offence charged in the indictment be legally punishable or not, is among the most unquestionable of its powers and duties. The decision of this question is the exercise of jurisdiction, whether the judgment be for or against the prisoner. The judgment is equally binding in the one case and in the other; and must remain in full
3437 force unless reversed regularly by a superior Court capable of reversing it."

And the method of reversing the judgment was by writ of error and not through a writ of habeas corpus.

The Supreme Court has consistently adhered to the principle announced in these early cases. Thus in Matter of Gregory, 219 U. S., 210, the Court, where the person applying for the writ had been convicted of a crime in the Police Court of the District of Columbia, Mr. Justice Hughes speaking
3438 for the Court, said:

"In hearing this application, this Court does not sit to review the correctness of the conclusion of the Police Court as to the violation of the statute by the petitioner, or of the decision of the Court of Appeals of the District as to the sufficiency of the information filed against him. The question here is not one of guilt or innocence but simply whether the Court below had jurisdiction to try the issues. And as we find that the statute conferred that jurisdiction the application for a writ of habeas corpus must be denied."

The principle is therefore as thoroughly established as any in the law that in applications for a writ of habeas corpus if it appears that **[1147]** there has been a judgment of conviction the only question to be considered is not whether the judgment was erroneous but whether the Court had jurisdiction to try the issue and to render the judgment. See Ex parte Parks, 93 U. S., 18; Ex parte Yarbrough, 110 U. S., 651; In re Coy, 127 U. S., 731; Gonzales vs. Cunningham, 164 U. S., 612; In re Eckert, 166 U. S., 481; Hyde vs. Shine, 199 U. S., 62, 83; Whitney vs. Dick, 202 U. S., 132, 136; 3440
Kaizo vs. Henry, 211 U. S., 146, 148. And see Harlan vs. McGourin, 218 U. S., 442, 448, where it is said that "Upon habeas corpus the Court examines only the power and authority of the Court to act, not the correctness of its conclusions."

The rule is correctly laid down in 17 Am. & Eng. Encyc. of Law, p. 1059, where it is said: "A conviction and sentence for a criminal offense cannot be collaterally attacked in habeas corpus proceedings for errors and irregularities not affecting the jurisdiction. But if a person is restrained of his liberty under an order or judgment which is 3441
void for want of jurisdiction, habeas corpus will lie."

In Henry vs. Henkel, 235 U. S., 219, decided in 1914, the Court declared that, subject to certain exceptions, it had "uniformly held that the hearing on habeas corpus is not in the nature of a writ of **[1148]** error nor is it intended as a substitute for the functions of the trial court. Manifestly, this is true as to disputed questions of fact, and it is equally so as to disputed matters of law, whether they relate to the sufficiency of the indictment or the validity of the statute on which the

3442 charge is based. These and all other controverted matters of law and fact are for the determination of the trial court. If the objections are sustained or if the defendant is acquitted he will be discharged. If they are overruled and he is convicted he has his right of review." Again the Court said:

> "Neither the issue nor the basis of the decision is changed when the person held under the warrant applies to a District Judge for discharge on writ of habeas corpus. So likewise
> 3443 the same issue and the same rule of decision must govern when the case is here on appeal from the order of the habeas corpus tribunal."

This Court in a recent opinion, not yet published, and concurred in by the Judge who entered the order now before the Court on this appeal, United States ex rel Meyer Ripstein vs. James M. Power, has held that a writ of habeas corpus cannot be used to review the weight of evidence but is confined to the single point of jurisdiction. And so in a recent decision of the Court of Appeals in New
3444 York it was declared that habeas corpus only tests the mandate under which the prisoner is held, and is not a substitute for a trial to determine innocence. People vs. Atwell (decided November 22, 1921.) **[1149].**

In Cooley's Constitutional Limitations, page 347, that eminent authority notices the fact that it has sometimes been attempted to be used as if it were a writ of error under which errors and irregularities of other judges and courts could be corrected. He declares:

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"• • • Any such employment of the writ is an abuse. Where a party who is in confinement under judicial process is brought up on habeas corpus, the court or judge before whom he is returned will inquire: 1. Whether the court or officer issuing the process under which he is detained had jurisdiction of the case, and has acted within that jurisdiction in issuing such process. If so, mere irregularities or errors of judgment in the exercise of that jurisdiction must be disregarded on this writ, and must be corrected either by the 3446
court issuing the process, or on regular appellate proceedings. • • •"

There are exceptions to the general rule that a conviction and sentence for a criminal offense cannot be collaterally attacked in a habeas corpus proceeding for errors committed upon the trial. The exceptions to that rule are as follows:

1. Where the rights or obligations of the United States under a treaty are involved, or where a subject or citizen of a foreign state and domiciled 3447
therein is in custody by State authority for an act done or omitted the validity and effect of which depend upon the law of nations. See Ex parte Royall, 117 U. S., 241, 251; Cunningham vs. Neagle, 135 U. S., 1, 71, 74; In re Mayfield, 141 U. S., 107; Boske vs. Commingore, 177 U. S., 466; In re **[1150]** Lincoln, 202 U. S., 178, 180-2.

2. Where there is a conflict of jurisdiction between a State and the United States, or where the authority and operations of the Federal Government are or may be interfered with by State

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action. See Tarbell's Case, 13 Wall., 397; Tennessee vs. Davis, 100 U. S., 257; Cunningham vs. Neagle, supra; In re Watts, 190 U. S., 1, 27.

3. Where the petitioner is held under State process based upon a State law, which is in violation of the Constitution of the United States. See Ex parte Royall, 117 U. S., 241, 247-50, 252, 253.

4. Where the judgment or order, under which the petitioner is held is void because in excess of the
3449 power of the court. See Ex parte Lange, 18 Wall., 163, 175-7; Hans Nielsen, 131 U. S., 176; Ex parte Hudgings, 249 U. S., 378.

In the case now before us for decision, great reliance is placed by the petitioner upon the case last cited. We are, however, unable to see that any analogy exists between that case and this. In Ex parte Hudgings, the District Judge, while presiding at the trial concluded, while the witness was on the stand giving his testimony, that he was committing perjury by asserting and reiterating that he could not recall having seen certain persons
3450 write, although he had frequently associated with them. **[1151]**

He testified that he had often seen the writing of the persons named, and thought the writings shown him were theirs, but that he could not so state from having seen them write as he could not recollect ever having seen them do so. The court interrupted the examination by saying:

> "This witness is going to be committed for contempt of court. The court is thoroughly satisfied, Mr. Witness, that you are testifying

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falsely when you say that you cannot recall of ever seeing Mr. MacMillan write, and this has happened several times during this trial with other witnesses, especially with your wife. * * *

"And it becomes the plain duty of the court to commit you to jail, sir, for contempt, and before doing so, I think it is the duty of the court to explain to you that the answer, 'I do not remember of ever having seen him write,' is just as false, is just as much contempt of court if you have seen him write, as it would be for you to say that you had never seen him write, without using the expression, 'I do not remember.'"

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The court also said:

"I am not going to allow you to obstruct the course of justice here, and if this nation has delegated power enough to this court and I am very sure it has, to deal with you in the manner proposed, I am going to do it."

Before the discharge of the witness from the stand an order for contempt against him was made and he was committed to the custody of the marshal.

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The Supreme Court held the commitment *void* for excess of power and therefore ordered the petitioner discharged. It held that perjury in **[1152]** facie curiae is not of itself punishable as contempt apart from its obstructive tendency. It declared that obstruction to the performance of judicial duty resulting from the act done is the characteristic upon which the power to punish for contempt must rest and that the presence of that element

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must clearly be shown, and that false swearing does not necessarily have an inherent obstructive effect. And the court pointed out that:

> "If the conception (that it necessarily had such an effect) were true, it would follow that when a court entertained the opinion that a witness was testifying untruthfully the power would result to impose a punishment for contempt with the object or purpose of exacting from the witness a character of testimony
3455 which the court would deem to be truthful; and thus it would come to pass that a potentiality of oppression and wrong would result and the freedom of the citizen when called as a witness in a court would be gravely imperiled."

We have referred to this case at length because of its remarkable and exceptional character. The case stands by itself and is properly regarded as sui generis. It affords no precedent for the claim put forward by the petitioner in support of the
3456 order appealed from. In the Hudgings case, without proof of guilt, without any evidence, without any hearing, the court forthwith ordered the imprisonment of the witness for an indefinite term until he should purge himself of the alleged contempt by testifying flatly the reverse of what he had stated to be the truth. In the instant **[1153]** case the District Judge certainly did not proceed summarily in imposing sentence upon the petitioner, as in the Hudgings case, inasmuch as about 17 months intervened between the commission of the act of contempt and the issuance of an order of commitment, while in the Hudgings case before the

witness had left the stand he was committed to the custody of the marshal. In the present case sentence was imposed at the end of legal proceedings of a thorough and deliberate nature, and in which the fullest inquiry was made into all the facts including the question as to whether the publication complained of tended to obstruct the administration of justice and the Trial Court found as a fact that the tendency and effect of the publication were to obstruct the administration of justice. The testimony taken at the trial covers 600 printed pages, and 100 pages more are taken up with the exhibits. Moreover, we may point out that what was done in the **[1154]** Hudgings case was done at least by a court empowered to review and set aside erroneous judgments in appropriate proceedings, while in the instant case it was done by a single judge clothed with no authority to revise or set aside erroneous judgments except when acting with those associated with him in the court of which he is a member. In granting the writ and discharging Craig he was acting alone and as a District Judge and his authority was exactly coextensive with that possessed by the Judge whose action he sought to exercise appellate jurisdiction over and whose errors he assumed to sit in judgment upon and to correct. The two cases thus present a marked contrast, and the one affords no authority for the other.

We do not find it necessary to review in detail the other cases relied upon by the petitioner. It suffices to say that the cases will be found to fall within the exceptions to the general rule heretofore stated in this opinion and therefore inapplicable to the facts of the case under consideration.

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We find no reason why this case is not governed by the general rule that a habeas corpus proceeding cannot be used as a writ of error but must be **[1155]** limited to jurisdictional questions. The procedure before Judge Mayer was in conformity with settled practice with respect to the subject matter of which the District Court had jurisdiction. No question of international law or of treaty obligations was involved; there was no conflict in jurisdiction between the State and Federal authorities; there was no State interference with the operations
3461 of the general government; the constructionality of no State law was assailed; the power of the Court under Section 268 of the Judicial Code was not exceeded.

This examination of the cases shows that the sole question which could be considered in the habeas corpus proceedings was as to the jurisdiction of the District Judge. If he had jurisdiction of the person of the petitioner Craig, and jurisdiction of the subject and authority to render the judgment which he pronounced, there was no right to inquire further in the habeas corpus proceed-
3462 ings, and no right to determine whether or not, in the exercise of that jurisdiction, the District Judge had committed error. If errors were committed, the law afforded a remedy therefor but not by habeas corpus.

So that the question therefore narrows itself down to this—did Judge Mayer have jurisdiction to render the judgment he pronounced upon Craig? **[1156]**

To render the jurisdiction of a Court complete, it must have jurisdiction over the subject matter, and over the person if the action is in personam as

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in the present case. Jurisdiction of the subject matter is the power to deal with the general subject involved in the action. In other words, the Court must have cognizance of the class of cases to which the one to be adjudicated belongs. And the subject matter concerning which we must inquire is as to the right of the District Court to punish for a contempt of its authority. The right of every superior Court of record to punish for contempt is inherent from the very nature of its organization, and is essential to its existence and protection, and to the proper administration of justice. Anderson vs. Dunn, 6 Wheat., 204; United States vs. Hudson, 7 Cranch, 32; Ex parte Kearney, 7 Wheat., 40; in ex parte Robinson, 19 Wall., 505, the Court said:

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> "The moment the Courts of the United States were called into existence and invested with jurisdiction over any subject, they became possessed of this power."

And in Blackstone's Commentaries, vol. 4, page 286, the great English commentator wrote:

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> "Laws without a competent authority to secure their administration from disobedience and contempt would be vain and nugatory. A power, therefore, in the Supreme Courts of justice to suppress such contempts by an immediate attachment of the offender, results from the first principles of judicial establishments, and must be an inseparable attendant upon every superior tribunal. **[1157]** Accordingly, we find it actually exercised as early as the annals of our law extend."

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A United States District Court is a Court of record of superior jurisdiction within the rule above stated, and as such it has, irrespective of statute, an inherent power to punish for contempt.

An Act of Congress, declaratory of the law, has expressly provided as follows:

> "The said Courts (United States Courts) shall have power * * * to punish, by fine or imprisonment, at the discretion of the Court, contempts of their authority; provided, that
3467 such power to punish for contempts shall not be construed to extend to any cases, except the misbehaviour of any person in their presence, or so near thereto as to obstruct the administration of justice * * *." The Judicial Code, Section 268 (36 St. at L., 1163).

It cannot be claimed, therefore, that the District Court was without jurisdiction of the subject matter of the contempt.

Conduct that is directed against the dignity and authority of a Court constitutes a criminal con-
3468 tempt of the Court. And it has been held that a publication, pending a trial, which reflects upon the Court, counsel, parties or witnesses, respecting the cause, constitutes a contempt. Hollingsworth vs. Duane, 12 Fed. Cas., No. 6,616; United States vs. Duane, 25 Fed. Cas., No. 14,997; In re Bronson, 12 Johns. (N. Y.), 460; Bloom vs. People, 23 Col., 416; People vs. Wilson, 64 Ill., 195.

Courts of record of superior jurisdiction **[1158]** possess inherent power to punish for contempt of Court. Middlesex Sheriff's case, 11 A. & E., 273; Rex vs. Davison, 4 B. & Ald., 329; Rhinehart vs.

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Lance, 43 N. J. L., 311; Cartwright's case, 114 Mass., 230; In re Chadwick, 109 Mich., 588; Tyler vs. Hamersley, 44 Conn., 393; Coleman vs. Roberts, 113 Ala., 323; Bradley vs. State, 111 Ga., 168; In re Rosenberg, 90 Wis., 581. The existence of such a power in the Court is essential to the due administration of justice.

It is equally clear that the Court had jurisdiction over the person of Craig. Jurisdiction of the person is acquired either by the service of process within the territorial limits of the jurisdiction upon the defendant personally, or by his voluntary appearance either in person or by attorney. It appears that Craig was duly served with process, and it is not necessary to inquire further. But as a matter of fact, he appeared also by counsel and personally. He entered a plea of not guilty and testified on his own behalf, and his testimony alone occupies 150 printed pages of the record.

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The judgment imposed—imprisonment for 60 days—was within the Court's jurisdiction. For the Section of the Judicial Code already set forth expressly declares that the Court shall have power to punish "by fine or imprisonment" in its discretion. **[1159]**

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The fact that the person involved happens to be an officer of a great municipality and as such is charged with heavy responsibilities does not affect the question presented to this Court and which must now be decided. So far as the question of law now presented to this Court is concerned, his status is not different from that of the humblest individual in the land. The law is no respecter of persons and no man can obstruct or interfere with the administration of justice in the courts.

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The legal question involved in these proceedings is not to be obscured by confusing the issue which is now presented to us by any discussion concerning whether the Court below in the exercise of its jurisdiction committed errors which the law required the correction of by other methods than the one which was adopted. And we think the question now presented must be determined without reference to whether the time has gone by within which a writ of error might have been taken. That has nothing to do with the question which we have

3473 to decide.

Moreover, if this Court is in error in the conclusion at which the majority of the Court has arrived, it is by no means impossible that the Supreme Court can correct any mistake we may have made.

The order appealed from is reversed and the appellee is remanded to the custody of the appellant. **[1160]**

Indorsement.

UNITED STATES CIRCUIT COURT OF

3474 APPEALS,

SECOND CIRCUIT.

In the Matter
of
CRAIG.

(Copy)

OPINION.

ROGERS,
Circuit Judge.

Filed May 22, 1922. **[1161]**

Concurring Opinion of Charles M. Hough, C. J. 3475

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT.

In the Matter

of

CHARLES L. CRAIG,
Petitioner-Appellee,

WILLIAM C. HECHT, United States Marshal,
Respondent-Appellant.

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HOUGH, C. J. (concurring):

Substantially as to reasoning, and wholly in result, I agree with Rogers, J. This memorandum is filed to emphasize my view that the order appealed from must be set aside because (1) it is but a part of a void proceeding; but (2) even assuming a valid procedure, the Court below exceeded its power in *habeas corpus.* 3477

As to the first point:—the paper writing upon which this proceeding rests is not a writ of *habeas corpus.* A document to be entitled to the name of writ must be issued by a Court and be returnable to the same; it must be under seal and tested by the proper officer. The writing that initiated this matter was no more than the personal direction of a single Judge.

Habeas corpus is but one of the writs well known in a practice regulated by the legislature but originating **[1162]** in, and interpreted by the rules of the common law.

3478 The requisites of a valid writ are stated in *Re Kaine,* 14 How., at page 119. The so-called writ in this instance was a nullity as much as would be a document similarly formed and called a writ of *venditioni exponas* or other familiar process.

I entirely agree with the remarks of Rogers, J., in respect of the power, or lack of power of a Circuit Judge to grant, issue or allow genuine writs of *habeas corpus.*

While, therefore, I regard the proceedings below as merely null, I join the rest of the Court in con-
3479 sidering the matters argued, as though a Circuit Judge duly qualified to hold, and holding a District Court had allowed a writ of *habeas corpus* to issue out of that Court and (upon the return of said writ) directed the relator to be discharged.

As to the second point above stated:—the general rule expressed in all the cases is undoubted, viz.: that *habeas corpus* cannot be treated as a writ of error; the scope of its inquiry is limited to an investigation of the jurisdiction of that tribunal or magistrate or other person whose action, order, judgment, sentence or decree has resulted in depriv-
3480 ing the relator of liberty.

It follows that upon hearing on return of writ, after any trial or equivalent proceeding, the Court acts after "taking the recited facts as conclusive truth" (*Re* **[1163]** *Savin,* 131 U. S., 267, at p. 276), and the only facts that can be shown by the relator by way of traverse, are those "not contradicting the record (which) prove lack of jurisdiction" (*Re Cuddy,* 131 U. S., 208).

This limited investigation the appellee herein deliberately chose; for he might have brought a writ of error and procured the full review of both law and facts fully illustrated by the history through all

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the Courts of *Toledo, etc. Co.* vs. *United States*, 247 U. S., 402.

It follows, therefore, that the first legal inquiry in this case is,—What is meant by jurisdiction?

That the word is plastic in the usage of the Supreme Court of the United States is certainly true; it must be admitted that where an examination of the record shows "no legal evidence to sustain a conviction" lack of jurisdiction exists (*Re Watts*, 190 U. S., 1); and where deprivation of liberty results from an excess of judicial power there is a similar lack. (*Re Hudgings*, 249 U. S., 378). 3482
But always the Court when considering a *habeas corpus* must take the record for verity except in so far as new matter attacks the jurisdiction of the sentencing Court.

There is no new matter in this record attacking jurisdiction; what really happened was that the case was tried over again, and the so-called writ was no more than a device for obtaining a new trial.

I take the record as binding upon the following vital point, viz.: the allegations of the information must **[1164]** be held to be true and the like 3483
assumption also made that what this appellee did, said and wrote was done wilfully and with the wrongful purposes charged by the indictment.

Thus there remains but one question—is it possible in point of law (not in point of fact, that is settled for us by the original findings) for the wrongfully intended acts of the appellee to constitute an "obstruction to the administration of justice?"

Neither this Court nor the Judge presiding upon a return in *habeas corpus* is or was entitled to answer this question as one of fact: and this Court

3484 has not, and the lower Court had not any right to review the facts and render a verdict of not guilty on the ground that the action of the appellee would not practically obstruct the alministration of justice.

We are bound to consider no more than the single question, whether such conduct with such intent could in point of law obstruct the administration of justice. It is my opinion that this question is answered in the affirmative by *Toledo, etc., Co.* vs. *United States, supra.*

3485 Therefore I think the order complained of should be reversed (1) for the nullity (not the irregularity) of the so-called writ; and (2) because had the process been proper, *habeas corpus* did not justify the inquiry upon which the lower Court embarked. **[1165]**.

Indorsement.

UNITED STATES CIRCUIT COURT OF APPEALS,

SECOND CIRCUIT.

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In the Matter

of

CHARLES L. CRAIG, &c.

OPINION.

HOUGH, Circuit Judge (concurring).
Filed May 22, 1922 **[1166]**

Dissenting Opinion of Learned Hand, D. J. 3487

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT.

In Re
CHARLES L. CRAIG.

LEARNED HAND, D. J. (Dissenting): The appealability of the order is settled already and with it appears to me to go the question whether it was 3488
an order of the District Court, since otherwise this Court would have no jurisdiction. Therefore, the questions are, what matters does the writ of habeas corpus review, and what are their merits?

All the books agree that the writ goes only to points of "jurisdiction," so that if that word were definite there would be no doubts. Unhappily, it is not. Generally it means that the offense which the Court decides to have been committed was one which it had power to determine. That is probably the exclusive original meaning. Ex parte Watkins, 3 Peters, 192; Ex parte Kearney, 7 3489
Wheat., 38; Ex parte Parks, 93 U. S., 18. If so, it is enough that the Court has said that it was punishing an offense within its powers; the question is not open whether there was any basis in fact for such an assertion.

Yet this is certainly not without exception the law in Federal courts. For example, it was in post-bellum times repeatedly held that when the Court was acting under an unconstitutional statute, the writ might raise that question. Ex parte Siebold, 100 U. S., 371; Ex parte Clarke, 100 U. S., 391; Ex parte Yarbrough, 110 U. S., 651; Ex parte

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[1167] Royall, 117 U. S., 241; In Re Coy, 127 U. S., 731. In Ex parte Royall, supra, the matter was squarely put as one of discretion. Recently the cases have declined to consider the unconstitutionality of the statute in this way, probably because of the increasing business of the Supreme Court, In Re Lincoln, 202 U. S., 178, Ex parte Spencer, 228 U. S., 652; Henry vs. Henkel, 235 U. S., 219; Glasgow vs. Meyer, 225 U. S., 420. The last cases in which the merits were in any respect considered were Matter of Heff, 197 U. S., 488,

3491 and Matter of Gregory, 219 U. S., 210.

Again, it is settled that when a State tries unlawfully to interfere by criminal prosecution with the activities of the United States, a Federal court may intervene in its discretion by habeas corpus. Prosecutions in State courts for perjury in Federal proceedings are within this rule, Ex parte Bridges, 2 Woods, 248; In Re Loney, 134 U. S., 372. In the same class are In Re Neagle, 135 U. S., 1, and Boske vs. Commingore, 177 U. S., 466. These are frankly cases where the conviction was for a crime over which the Court below had jurisdiction in

3492 the usual sense, just as much as in the case of an unconstitutional statute.

There seems to be no fixed rule to tell what errors of the Court below will be treated as jurisdictional, e. g., Ex parte Lange, 18 Wall., 163. An extreme case is Hans Nielsen, Petitioner, 131 U. S., 176, a case of very doubtful authority in view of Ex parte Bigelow 113 U. S., 328, and In Re Belt, 159 U. S., 95, unless it be confined to cases arising in territorial courts, which hardly seems a valid distinction. In Ex parte Bain, 131 U. S., 1, the error of amending an indictment was treated as juris-

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dictional. Obviously the distinction between the formal jurisdiction of a Court and the regularity of its procedure is not rigid. **[1168]**

The upshot of it seems to me to be that while in general the writ will not be used as a substitute for a demurrer, Ex parte Watkins, supra; Ex parte Parks, supra; In Re Coy, supra; Hyde vs. Shine, 199 U. S., 62, 82, or for a demurrer to the evidence, Harlan vs. McGourin, 218 U. S., 442, yet when large public interests demand immediate action it may. Even then it is clear that the review is limited to whether there was any basis on the facts as found for the action reviewed, Ex parte Terry, 128 U. S., 289, 305, 306; In Re Debs, 158 U. S., 564, 600. The appellant's attempt rigidly to classify these exceptions appears to me more definite than the books warrant. A safer rule is to say somewhat vaguely that they must be occasions of pressing necessity.

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The law seems to be decidedly more liberal in contempt cases, no doubt because of their summary character and liability to abuse. With the exception of Ex parte Kearney, supra, I have found no case in the Supreme Court which refused to consider the merits, at least, to determine whether the offense was in fact within the statute of contempts (Sec. 268 of the Judicial Code). That case turned on the privilege of a witness against self-incrimination, and if the privilege in fact existed the Court was in error for committing the witness. It was possible to say that the privilege destroyed jurisdiction, just as the appellee here argues of Craig's supposed privilege; indeed, that would have been no stronger than Hans Neilsen, Petitioner, supra. But very few cases have gone

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3496 as far as that. Certainly it can be said that the decision is not an authority against the appellee here in so far as concerns an examination of the existence of those facts on which the Court's power was defined, because in Ex parte Kearney, supra, no one questioned that the witness had refused to answer. Moreover, the case was decided before 1831, when the common-law powers **[1169]** of the Court were first limited by the proviso of Section 268.

In Savin, Petitioner, 131 U. S., 267, and Cuddy, Petitioner, 131 U. S., 280, both decided at the same
3497 time, the question was considered whether the misconduct in fact obstructed justice although the relator was unsuccessful in each case. In Cuddy's case it was expressly said (page 286), that had the facts shown that he was not guilty he would have been discharged. There appear to have been no exceptional circumstances to justify a recourse to habeas corpus as against the more usual methods.

In Re Watts & Sachs, 190 U. S., 1, turned on whether the relators had in fact violated the order of the bankruptcy court. This point was examined and the relators released. It is true that there was
3498 a conflict between State and Federal authority, but there was no occasion to vindicate the Federal authority since the District Court had already done so, and indeed, if I may use the phrase, overdone so.

In general, it is well settled that the writ will lie when the conviction is for violation of an order which the Court had no power to make, Ex parte Rowland, 104 U. S., 604, Ex parte Fisk, 113 U. S., 713, In Re Ayres, 123 U. S., 443, In Re Reese 98 Fed. R., 984; Ex parte Robinson, 144 Fed. R., 835. The appellant answers these by saying that

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a void order cannot be the basis of any action, but that begs the question. That precise argument applies equally to unconstitutional statutes, yet it is now settled, as I have said, that generally it is not enough that the statute under which the Court acts is unconstitutional; that point must ordinarily be raised by writ of error. Though the order be void whose violation is punished, it would have been as easy to say, as in Re Lincoln, supra, for example, that the Court was engaged in punishing an offense over **[1170]** which it concededly had jurisdiction in the stricter sense, and that therefore the review must be by writ of error. The cases are clear authority for the proposition that habeas corpus will, at times anyway, examine whether the underlying facts necessary to the commitment exist.

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Cuyler vs. Atlantic etc. Co. (In Re Daniels), 131 Fed. R., 95, though only a decision of a Circuit Judge, is squarely in point, and the ruling in this respect is not affected by the fact that on the merits it conflicts with Toledo Newspaper Co. vs. U. S., 247 U. S., 402.

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In Ex parte Buskirk, 72 Fed. R., 14 (C. C. A., 4th), the contempt punished had been for violation of a stipulation, and the relator was discharged on habeas corpus. The case is analogous to Ex parte Rowland, supra, and its fellows just above cited.

But the most recent, and I think an entirely apposite case, is Ex parte Hudgings, 249 U. S., 378. There the question was the same as here, and in Savin, Petitioner, supra, i. e., whether there had been misbehaviour obstructing the administration of justice, and the Supreme Court examined the

3502 question on the facts to ascertain whether the cause was within the Court's jurisdiction. It recognized that the usual course was by writ of error, but thought that the circumstances justified an exception in that case. Its reasons for so thinking are to be found on page 384 as follows: "In view of the nature of the case, of the relation which the question which it involves bears generally to the power and duty of Courts in the performance of their functions, of the dangerous effect on the liberty of the citizen when called upon as a witness
3503 in a court which might result if the erroneous doctrine upon which the order under review was based were not promptly corrected, we are of opinion that the case is an exception." **[1171]**

This case therefore very clearly turned on a question of discretion and that a question of no greater public importance than here. Not only does the case at bar arise from a controversy between a Municipality and the District Court, but the result of the Court's order was to imprison Craig for sixty days. He is the chief financial officer of a city of six million inhabitants and his
3504 enforced absence from his duties was presumptively a matter of public concern, quite independent of any interests of his own. Its enforcement would in the nature of things be likely to arouse public feeling and to have an importance altogether greater than that of a private person. If the freedom of witnesses called to court justified an exception, it seems to me that the case at bar must do so. Finally, it should be remembered that before Toledo Newspaper Co. vs. U. S., supra, the law had been much misunderstood, and if that case was rightly interpreted in the District Court the pow-

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ers of a judge in contempt have a scope which, so far as I can see, is scarcely distinguishable in final result from contempt at common law. If so, it is of added importance that this should be understood with as little delay as possible, because nothing can more nearly touch the liberty of the citizen. Prosecution for contempt may be and generally is summary beyond any other; the fact that it was not summary in the case at bar is immaterial. If the citizen is liable to its impact, whenever he animadverts upon a judge before whom no decision is presently pending which his language can 3506
affect, no one can deny that the question is of high moment. I cannot therefore doubt that the Circuit Judge had the power in his discretion to issue the writ and to determine whether there was any basis in fact for the commitment. **[1172]**

It is quite true that recourse to so exceptional a remedy ought to be rare when the judge issuing the writ is of co-ordinate jurisdiction with the committing court, especially here, since Craig had not been denied his release pending writ of error. What may be urgency enough for the Supreme Court, is not necessarily the same for one District 3507
Judge in reviewing another. Indeed, if the time had not long since expired within which a writ of error could be filed, I should be disposed to reverse the order on the ground that though permissible the writ was not necessary to accomplish justice, and should not have been granted. Nevertheless, this consideration does not go to the power to issue it, nor generally to the considerations which make the case an exception, but rather to the propriety of its issuance by a single judge. It seems to me an answer that if the writ now fails, the relator

3508 will lose, by a mistake in his remedy, any opportunity to review the case in any court. In view of this supervening situation I think we should ignore the objection, and treat the case as though the application had been originally made to an appellate court.

The question upon the merits is whether the letter obstructed the administration of justice. The information alleged that it tended and was intended to influence the court in the consideration of the receivership proceedings, to intimidate the
3509 Court and to compel it to decide future questions as the relator wished, and to obstruct the Court's orders in such suits. As the case comes up after conviction, I think that the relator's intent must be taken as proved, but nowhere in the information or the evidence does it appear what future decisions the letter would in fact have influenced. Apparently there was nothing pending **[1173]** at the time and so far as appeared nothing imminent on which the Court was to act.

It is true, we can see from the record that there were certain matters which might, and probably
3510 would, come before the court, arising between the City and the railways. The City was a large investor and had very large claims against the roads. It was at least possible that disputes might arise as to their allowance when the property was disposed of. It was also possible that under the leave reserved, the City might again apply for a co-receiver, though nearly nine months had passed and two other receiverships had been granted without any such renewal. Although it does not appear in the record, perhaps I should also assume that there would be other matters arising in

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the receivership, all of which must come before the same judge and which would involve the City's interests.

Therefore the case presents the question whether the possibility, and if one likes, the probability, that such questions would come up coupled with the intention to influence the Court if they did, was enough to bring the letter within Section 268. I agree with the suggestion of Judge Denison in Toledo Newspaper Co. vs. U. S., 237 Fed. R., 986, 990, that there may be no absolute necessity that the utterance should affect a case actually pending. Thus if one should threaten a judge with personal injury, if he did not decide a case in a given way, it would be a contempt though the case was not yet filed. The rule does not depend upon formalities. Conversely, I think it makes no difference here that the possible proceedings which might be affected would arise procedurally in the same suit. They would be as little and as much influenced as though they came up by independent proceedings. The **[1174]** point as I view it is the proximity of the result to the misbehaviour.

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In the somewhat analogous case of obstructing the draft the Supreme Court laid down the rule that the words must constitute "clear and present danger," that the evil will result, Schenck vs. U. S., 249 U. S., 47, 52. In Frohwerk vs. U. S., 247 U. S., 204 and Abrams vs. U. S., 250 U. S., 616, the rule was not repeated and the element of intent was emphasized but the effect of the words was none the less immediate and I do not understand that the earlier test was repudiated. I cannot suppose, for example, that it would make the abuse of a judge for a past decision a contempt to

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3514 show that the utterer intended generally to intimidate the judge, should a similar case arise in the future, if it was uncertain whether it would in fact arise or when. If the words do not themselves refer to the future, the circumstances surrounding their utterance must be such as immediately to cause the evil which the statute seeks to suppress. A merely possible result, though intended, does not seem to be to me enough. As was said in Schenck vs. U. S., supra, "it is a question of proximity and degree."

3515 For instance, it is common enough for newspapers to criticize very severely even the decisions of the Supreme Court, and everyone agrees that this is not unlawful. Suppose it be shown that it is the purpose of the editors to influence the Court in future cases of that general character, by showing that the decision meets with popular disapproval. Probably that is often the intent. I cannot suppose that immunity depends upon the absence of any such purpose. If so, the editors stand in more peril than I believe they suppose. Rather, as it seems to **[1175]** me, it must be shown either

3516 that the words refer to future decisions and constitute in substance a threat, or that owing to the immediacy of some case, they in fact constitute an immediate intimidation. Usually I believe the decision to be affected must be one which is already sub judice, but, if not, it must be one to whose unbiased determination the utterance is a "clear and present danger."

Nor does the distinction seem to me without a sound basis in policy. It is in small encroachments upon the right of free criticism of all the acts of public officials that the real danger lies. If

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a judge may punish those who indirectly interfere with possible decisions, remote in time, when the force of the present obloquy has been spent, the line between that and punishment for unseemly or false comment upon past decisions becomes so shadowy as in application to disappear. It will in effect be practically impossible to show that the utterer did not have in mind the future effect of his words upon similar cases in the future. Especially in this case if there be added the doctrine that all men are charged with those results of their conduct which are to be reasonably apprehended.

3518

Hence I cannot agree that the intent which I must accept as proved in the case at bar takes the letter out of the class of comment, which whether or not defensible morally, is immune from summary punishment by contempt. It seems to me beyond such prosecution in the interest of free discussion, regardless either of its temper or even of its truth. As to such injuries a judge in company with all other public officials has no higher protection than a private person. Indeed, the letter strikes me as indistinguishable from the common instance of a disappointed suitor who vents his spleen upon the judge, with a disregard of truth, I assume that generally such a one has it in his **[1176]** mind to teach the judge a lesson, which he expects that his interest if not his conscience may be able to understand. Nor does the fact that the letter was false, while it greatly affects the moral quality of the act, determine its criminality. It is punishable only if it interferes with justice, and in that respect truth is harder to meet than falsehood.

3519

The case of Toledo Newspaper Co. vs. U. S., supra, does not touch the point at all. It finally

3520 determines that the test of the proximity (nearness) of the misbehaviour is casual, not spatial, but that is all. The utterances there were by their terms directed towards a matter actually sub judice, and the danger was "clear and present" if any danger could be. There was no intimation that any statements were not only not then pending, but, if and when they arose, remote in time.

The writ was not sealed and was irregularly tested, but those are procedural irregularities only. After return regularly made it is too late to raise
3521 them now. They were curable at any stage.

I think that the relator was properly discharged and that the order should be affirmed. **[1177]**

Indorsement.

UNITED STATES CIRCUIT COURT
OF APPEALS,

SECOND CIRCUIT.

3522

In Re CRAIG.

(Copy)

DISSENTING OPINION.

LEARNED HAND, D. J.

Filed May 22, 1922 **[1178]**

Order for Mandate Before Amendment.

3523

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the Court Rooms in the Post Office Building in the City of New York, on the 25th day of May, one thousand nine hundred and twenty-two.

Present—Hon. HENRY WADE ROGERS,
Hon. CHARLES M. HOUGH,
Circuit Judges.
Hon. LEARNED HAND, District Judge.

3524

In the Matter
of
CHARLES L. CRAIG,
Petitioner,
WILLIAM C. HECHT, as United States Marshal,
Appellant.

3525

Appeal from the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the

3526

order of said District Court be and it hereby is reversed and the appellee is remanded to the custody of the appellant.

H. W. R.,
C. M. H.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree. **[1179]**

3527

Indorsement on Order.

UNITED STATES CIRCUIT

COURT OF APPEALS,

SECOND CIRCUIT.

In re C. L. CRAIG.

3528

ORDER FOR MANDATE.

United States Circuit Court of Appeals,
Second Circuit.

Filed May 31, 1922.

William Parkin, Clerk. **[1180]**

Order to Show Cause.

3529

UNITED STATES CIRCUIT COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

In the Matter

of

CHARLES L. CRAIG,
Petitioner-Appellee,

3530

WILLIAM C. HECHT, as United States Marshal,
Respondent-Appellant.

Upon the annexed affidavit of Edmund L. Mooney, verified June 19th, 1922, the copy of the order for mandate entered and filed herein in the office of the Clerk of this Court on May 25, 1922, and the proposed order resettling and amending the said order of mandate;

LET the respondent-appellant or his attorney, 3531
the United States District Attorney for the Southern District of New York, show cause before this Court at the Chambers of Honorable Henry Wade Rogers, Senior Circuit Judge for the Second Circuit, in the United States Post Office Building, in the Borough of Manhattan, City of New York, on the 26th day of June, 1922, at 10:30 o'clock in the forenoon of said day or as soon thereafter as counsel can be heard why the order for mandate made, entered and filed herein in the office of the Clerk of this Court on May 25, 1922, should not be resettled and amended as follows:

3532

In the first paragraph of the said order by striking therefrom the words "from the District Court of the United States for the Southern District of New York" and **[1181]** in lieu thereof inserting the words "from the order of Honorable Martin T. Manton, Circuit Judge of the United States, filed with the Clerk of the United States District Court for the Southern District of New York, April 29th, 1921, and recorded in said Court."

In the second paragraph of said order by striking therefrom the words "from the District Court
3533 of the United States for the Southern District of New York," and inserting in lieu thereof the words "certified by the Clerk of the District Court of the United States, Southern District of New York."

In the third paragraph of the said order by striking therefrom the words "the order of the said District Court" and inserting in lieu thereof the words "the said order of Honorable Martin T. Manton, Circuit Judge of the United States."

In the fourth paragraph of said order by striking therefrom the words "to the District Court in accordance with the decree" and in lieu thereof
3534 inserting the words "in accordance with this decree to said Circuit Judge."

And for such other and further relief as to the Court may seem just and proper in the premises.

Sufficient reason appearing therefor, a copy of this order and the papers upon which it is granted, served upon the attorney for the respondent-appellant on or before the 20th day of June, 1922, shall be deemed due and sufficient service thereof.

Dated, New York, June 20, 1922.

HENRY WADE ROGERS,
United States Circuit Judge,
Second Circuit. **[1182]**

Affidavit of Edmund L. Mooney. 3535

UNITED STATES CIRCUIT COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

In the Matter

of

CHARLES L. CRAIG,
Petitioner-Appellee,

3536

WILLIAM C. HECHT, as United States Marshal,
Respondent-Appellant.

United States of America,
Second Judicial Circuit,
Southern District of New York, } ss.:

I, Edmund L. Mooney, being duly sworn, say:

I am special counsel with the Corporation Counsel of the City of New York, attorney for the petitioner-appellee, Charles L. Craig, in the above entitled proceeding. 3537 On May 25, 1922, there was made and entered and filed in the office of the Clerk of this Court an order for mandate, a copy of which is annexed hereto and made a part of this affidavit.

That said order for mandate as signed, recites that the appeal is from the District Court of the United States for the Southern District of New York. Further, that the cause came on to be heard in this Court on the transcript of record from the District Court of the United States for the Southern District of New York, and in the paragraph of the order for mandate decreeing a

3538

reversal, the order appealed from is described as an order of said District Court. **[1183]**

The proceeding which resulted in the order appealed from was before the Honorable Martin T. Manton, United States Circuit Judge (fols. 2605-2607). The endorsement of the Record itself is merely "Transcript of Record."

The Petition for Appeal prays for leave to appeal from

3539

> "The final order made and entered herein by the Honorable Judge Martin T. Manton, Circuit Judge of the United States on the 29th day of April, 1921, sustaining the writ of habeas corpus," etc. (Record, fols. 1-3).

The order allowing the appeal herein describes the order appealed from as follows:

> "From the order made and entered herein on the 29th day of April, 1921, sustaining the writ of habeas corpus," etc. (fols. 10-12).

3540

The citation on appeal describes the order appealed from as follows:

> "Final order of the Honorable Martin T. Manton, Circuit Judge of the United States" (fols. 13-15).

The Assignment of Errors referring to the order appealed from states:

> "The said Judge erred in making the order sustaining the writ of habeas corpus herein and discharging the said Charles L. Craig," etc. (Assignment of Errors, VII).

3541

It also appears that the order itself, that is, the order appealed from, is signed "Martin T. Manton, United States Circuit Judge" (Record, fols. 93-95).

The record of the contempt proceedings before United States District Judge Mayer was admitted and marked in evidence by counsel for the petitioner-appellee as part of the proceeding which resulted in the order appealed from. That is to say, that in the habeas corpus proceeding before United States Circuit Judge Manton, a stenographic trans-
[1184] script of all of the testimony taken and all of the exhibits, both the Government's and the 3542
petitioner's in the contempt proceedings were offered and received in evidence in the proceeding before United States Circuit Judge Manton (fols. 2639-2640).

The order for mandate herein as entered and filed on May 25, 1922, was drawn and entered by the Clerk of this Court. I am making this affidavit in support of an application to amend and resettle the said order for mandate in the following respects:

In the first paragraph of the said order it is submitted that the words "from the District Court 3543
of the United States for the Southern District of New York" should be stricken therefrom and in lieu thereof should be inserted the words "from the order of Honorable Martin T. Manton, Circuit Judge of the United States, filed with the Clerk of the United States District Court for the Southern District of New York, April 29th, 1921, and recorded in said Court."

In the second paragraph of said order there should be stricken therefrom the words "from the District Court of the United States for the South-

3544 ern District of New York," and inserted in lieu thereof the words "Certified by the Clerk of the District Court of the United States, Southern District of New York."

In the third paragraph of the said order there should be stricken therefrom the words "the order of the said District Court" and inserted in lieu thereof the words "the said order of Honorable Martin T. Manton, Circuit Judge of the United States." **[1185]**

In the fourth paragraph of said order there
3545 should be stricken therefrom the words "to the said District Court in accordance with this decree" and in lieu thereof should be inserted the words "in accordance with this decree to said Circuit Judge."

A proposed form of an order resettling and amending the order for mandate entered herein May 25, 1922, in the respects indicated, is hereto annexed and submitted.

An order to show cause is asked and I respectfully request that the usual four days' notice of motion be dispensed with for the reason that the pe-
3546 titioner-appellee desires to have the record in this case certified by the Clerk of this Court, and, in fact, has already requested such certification, so that at the very earliest date a petition for a writ of certiorari may be docketed in the Clerk's office of the Supreme Court of the United States, and for the further reason that this Court is now in vacation.

3547

No previous application has been made for the relief herein asked.

EDMUND L. MOONEY.

Sworn to before me this
19th day of June, 1922.

ANDREW R. MCLAREN,
Notary Public,
New York Co.
(Seal) **[1186]**

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3549

3550 **Copy Order Annexed to Affidavit.**

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the Court Rooms in the Post Office Building in the City of New York, on the 25th day of May, one thousand nine hundred and twenty-two.

Present—Hon. HENRY WADE ROGERS,
" CHARLES M. HOUGH,
Circuit Judges.
" LEARNED HAND,
3551 District Judge.

In the Matter
of
CHARLES L. CRAIG,
Petitioner,
WILLIAM C. HECHT, as United States Marshal,
Appellant.

3552 Appeal from the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the order of said District Court be and it hereby is reversed and the appellee is remanded to the custody of the appellant.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree. **[1187]**

H. W. R.
C. M. H.

Proposed Order Amending Order for Mandate, Annexed to Affidavit.

At a Stated Term of the United States Circuit Court of Appeals in and for the Second Circuit, held at the Court Rooms in the Post Office Building in the City of New York on the day of June, one thousand nine hundred and twenty-two.

Present—Hon. HENRY WADE ROGERS,
" CHARLES M. HOUGH,
Circuit Judges,
" LEARNED HAND,
District Judge.

In the Matter
of
CHARLES L. CRAIG,
Petitioner-Appellee,
WILLIAM C. HECHT, as United States Marshal for the Southern District of New York,
Respondent-Appellant.

The petitioner-appellee having moved this Court by order to show cause dated June 20th, 1922, for an order amending the order for mandate of this Court heretofore made, entered and filed in the office of the Clerk of this Court on May 25, 1922, as follows:

3556 *Proposed Order Amending Order for Mandate, Annexed to Affidavit.*

In the first paragraph of the said order by striking therefrom the words "from the District Court of the United States for the Southern District of New York" and inserting in lieu thereof the words "from the order of Honorable Martin T. Manton, Circuit Judge of the United States, filed with the Clerk of the United States District Court for the Southern District of New York April 29th, 1921, and recorded in said Court." **[1188]**

3557 In the second paragraph of said order by striking therefrom the words "from the District Court of the United States for the Southern District of New York," and inserting in lieu thereof the words "Certified by the Clerk of the District Court of the United States, Southern District of New York."

In the third paragraph of the said order by striking therefrom the words "the order of the said District Court" and inserting in lieu thereof the words "the said order of Honorable Martin T. Manton, Circuit Judge of the United States."

In the fourth paragraph of said order by striking therefrom the words "to the said District

3558 Court in accordance with this decree" and in lieu thereof inserting the words "in accordance with this decree to said Circuit Judge."

And said motion having come on duly to be heard before this Court on the day of June, 1922, and after hearing Edmund L. Mooney, counsel for the petitioner-appellee, in support of the said motion, and

United States District Attorney for the Southern District of New York in behalf of the respondent-appellant, in opposition thereto, and due deliberation being had thereon, and on motion of

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John P. O'Brien, Esq., Corporation Counsel of the City of New York, attorney for the petitioner-appellee, it is

ORDERED, that the order for mandate of this Court heretofore made, entered and filed herein on May 25, **[1189]** 1922, as follows:

"At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the Court Rooms in the Post Office Building in the City of New York, on the 25th day of May, one thousand nine hundred and twenty-two.

3560

Present—Hon. HENRY WADE ROGERS,
" CHARLES M. HOUGH,
Circuit Judges.
" LEARNED HAND,
District Judge.

3561

In the Matter
of
CHARLES L. CRAIG,
Petitioner-Appellee,
WILLIAM C. HECHT, as United States Marshal,
Respondent-Appellant.

Appeal from the District Court of the United States for the Southern District of New York.

Proposed Order Amending Order for Mandate, Annexed to Affidavit.

3562

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the order of said District Court be and it hereby is reversed and the appellee is remanded to the custody of the appellant.

3563

It is further ordered that a Mandate issue to the said District Court in accordance with this decree."

be and it hereby is amended and resettled nunc pro tunc to read as follows:

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"At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the Court Rooms in the Post Office Building in the **[1190]** City of New York, on the day of June, one thousand nine hundred and twenty-two.

Present—Hon. HENRY WADE ROGERS,
" CHARLES M. HOUGH, Circuit Judges. 3566
" LEARNED HAND, District Judge.

In the Matter
of
CHARLES L. CRAIG,
Petitioner-Appellee,
WILLIAM C. HECHT, as United States Marshal,
Respondent-Appellant. 3567

Appeal from an order signed by Honorable Martin T. Manton, filed with the Clerk of the United States District Court for the Southern District of New York, April 29, 1921, and recorded in said Court.

This cause came on to be heard on the transcript of record certified by the Clerk of the District Court of the United States, Southern District of New York, and was argued by

3568 *Proposed Order Amending Order for Mandate, Annexed to Affidavit.*

counsel; on consideration whereof, it is now hereby

ORDERED, ADJUDGED AND DECREED that the said order be and it hereby is reversed and that the appellee is remanded to the custody of the appellant; it is further

ORDERED, that a mandate issue in accordance with this decree." **[1191]**

3569

Indorsement.

Court's Memorandum on Motion to Amend.

This application to amend the order for mandate in the Matter of Craig is hereby granted to the extent shown in the annexed papers.

June 26, 1922.

3570

H. W. R.
C. M. H. **[1192]**

Answering Affidavit on Motion to Resettle Order. 3571

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT.

In the Matter
of
CHARLES L. CRAIG,
Petitioner-Appellee,
WILLIAM C. HECHT, as United States Marshal for the Southern District of New York,
Respondent-Appellant. 3572

Southern District of New York, } ss.:
County of New York, }

David V. Cahill, being duly sworn says:

I am Special Assistant United States Attorney for the Southern District of New York; have been of Counsel for the Government in the above entitled case since its inception as a prosecution for criminal contempt and have had exclusive charge of this appeal. 3573

With respect to the pending motion I respectfully call the Court's attention to the fact that while it is in form a motion to resettle and amend this Court's order dated May 25, 1922, it is in fact a motion for reargument of an issue decided by this Court. It seeks again to raise the issue whether the order signed by a Circuit Judge was a Court Order

3574 or a Judge's Order. That issue was raised, discussed and decided on the motion to dismiss the appeal herein. It was discussed in the briefs by counsel on both sides and was discussed at length on the oral argument on the motion to dismiss the appeal. This Court filed no written opinion when it decided that motion but its opinion on the merits of the appeal disposes of that issue and finally decides that the order was a Court Order. **[1193]**

That decision was made without regard to the form of the order. The appellant was undecided as
3575 to whether it was a Court Order or a Judge's Order and it was not in appellant's power to decide the question. In the appeal papers the order was described by reference to the Judge who signed it, its date and its purport and effect. These terms of description no matter how they may be treated cannot be considered as fixing the character of the order. Even if the appellant had elected to treat it as a Judge's Order this Court would not be bound by his choice. As a matter of fact in the brief submitted in opposition to the motion to dismiss the appeal one point in the argument was that assum-
3576 ing the order to be a Court Order it was appealable. The next point was that assuming it to be a Judge's Order, it was appealable.

In this Court's decision on the merits it referred to the opinion of the Circuit Judge referring to the order designating him to hold the District Court. This reference of the Circuit Judge immediately preceded his denial of the motion to dismiss the writ of habeas corpus for want of authority to issue it (fols. 46-47 of the record).

Furthermore throughout the whole proceeding the appellee urged that the question of the power of the

Circuit Judge to issue the writ of habeas corpus and to make the order appealed from was a moot question.

In the traverse to the return at folios 2559-2550, Volume 2 of the Record, petitioner-appellee says:

> "Your petitioner still further avers and alleges that any question of your Honor's jurisdiction or authority to issue the said writ of habeas corpus in your capacity as Circuit Judge of the Second Circuit, is a moot question, in view of the fact that you had been 3578
> designated and at the same time and place you were actually acting in the place of the District Judge ordinarily assigned for the transaction of such matters."

In the argument on the writ Counsel for the Appellee asked the Circuit Judge to take judicial notice of the order designating **[1194]** him to hold the District Court (fol. 2610) and urged that the question of his power to act as Circuit Judge in the matter was "an entirely moot or academic point" (fol. 2611). 3579

Throughout the whole argument the assertion of the power to issue the writ and make the order was coupled with a reference to the order of designation. Another instance is at folio 2642.

The proof offered at folios 2643-3659 relates entirely to this point. When it was proposed by counsel for the appellee to prove that the Circuit Judge had been designated to hold the District Court, objection was made by counsel for the appellant that it was immaterial (fol. 2645). The Court said:

3580 "Of course, you are trying to take advantage of this assignment, I take it."

And Counsel for the Appellee said:

"In other words, I want to super-add this assignment."

The assignment referred to was the order designating the Circuit Judge to hold the District Court. It was received in evidence over appellant's objec-
3581 tion.

The appellee went beyond this and endeavored to show that the Circuit Judge was the only one holding the District Court at the time when the paper called the Writ of Habeas Corpus was issued (fols. 2650-2657).

I have gone thus fully into the issue in order to recall to the Court's attention the facts out of which the issue arises.

I again respectfully urge that this motion is an effort indirectly to reopen an issue that has been finally closed and determined by this Court. It is
3582 without **[1195]** reason or merit and contrary to the rules and policy of this Court.

DAVID V. CAHILL.

Sworn to before me this
day of June, 1922.

CARL. BRECHER,
Notary Public,
Kings County.
Clerk's No. 496, Register's No. 3178;
N. Y. Clerk's No. 317, Reg's No. 3340;
Commission expires March 30, 1923. **[1196]**

Amended Order for Mandate.

3583

[1197]

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the Court Rooms in the Post Office Building in the City of New York, on the 27th day of June, one thousand nine hundred and twenty-two.

Present—Hon. HENRY WADE ROGERS,
" CHARLES M. HOUGH, Circuit Judges
" LEARNED HAND, District Judge.

3584

In the Matter
of
CHARLES L. CRAIG,
Petitioner-Appellee,
WILLIAM G. HECHT, as United States Marshal,
Respondent-Appellant.

3585

A motion having been made herein by counsel for the Petitioner Appellee to amend the order for mandate filed and entered herein on the 31st day of May, 1922.

Upon consideration thereof it is

ORDERED that said order be and it hereby is amended to read as follows, to wit:

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"At a stated term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the Court Rooms in the Post Office Building, in the City of New York, on the 29th day of May, one thousand nine hundred and twenty-two.

Present—Hon. HENRY WADE ROGERS,
" CHARLES M. HOUGH,
Circuit Judges.

3587 " LEARNED HAND,
District Judge.

In the Matter
of
CHARLES L. CRAIG,
Petitioner-Appellee,
WILLIAM G. HECHT, as United States Marshal,
Respondent-Appellant.

3588

Appeal from the order signed by Honorable Martin T. Manton, filed with the Clerk of the United States District Court for the Southern District of New York, April 29, 1921, and recorded in said Court.

This cause came on to be heard on the transcript of record certified by the Clerk of the District Court of the United States, Southern District of New York, and was argued by counsel; on consideration whereof it is now hereby,

ORDERED, ADJUDGED AND DECREED that said order be and it hereby is reversed and that the appellee is remanded to the custody of the appellant; it is further

ORDERED that a mandate issue in accordance with this decree."

H. W. R.
C. M. H. **[1197]**

3590

Indorsement on Order.

UNITED STATES CIRCUIT COURT OF APPEALS

SECOND CIRCUIT.

In re
CHARLES L. CRAIG

3591

Original

ORDER

United States Circuit Court of Appeals, Second Circuit.

Filed, June 28, 1922.

William Parkin, Clerk. **[1198]**

3592 **Clerk's Certificate.**

United States of America,
Southern District of New York, } ss.:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages numbered from 1 to 1198 inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of In the Matter of Charles L. Craig, as the same remain of record and
3593 on file in my office.

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 28th day of June in the year of our Lord one thousand nine hundred and twenty-two and of the Independence of the said United States the one hundred and forty sixth.

WILLIAM PARKIN,
Clerk.

3594 Seal:
United States Circuit
Court of Appeals
Second Circuit **[1199]**

UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Second Circuit, Greeting:

Being informed that there is now pending before you a suit in which William C. Hecht, United States Marshal for the Southern District of New York, is appellant, and Charles L. Craig is appellee, which suit was removed into the said Circuit Court of Appeals by virtue of an appeal from order signed by Honorable Martin T. Manton filed with the Clerk of the District Court of the United States for the Southern District of New York, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States, Do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the twenty-sixth day of October, in the year of our Lord one thousand nine hundred and twenty-two. Wm. R. Stansbury, Clerk of the Supreme Court of the United States.

[Endorsed:] File No. 29,038. Supreme Court of the United States, No. 488, October Term, 1922. Charles L. Craig vs. William C. Hecht, United States Marshal, etc. Writ of Certiorari. United States Circuit Court of Appeals, Second Circuit. Filed Nov. 6, 1922. William Parkin, Clerk.

United States Circuit Court of Appeals for the Second Circuit.

WILLIAM C. HECHT, United States Marshal for the Southern District of New York, Appellant,

against

CHARLES L. CRAIG, Appellee.

It is hereby stipulated that the transcript already filed in the Clerk's office of the Supreme Court of the United States, with the petition for the writ of certiorari, be taken as a return to said writ, dated the twenty-sixth day of October, 1922. James M. Beck, Solicitor General. John P. O'Brien, Attorney and Corporation Counsel for the City of N. Y., Counsel for Charles L. Craig.

To the Honorable the Supreme Court of the United States, Greeting:

The record and all proceedings whereof mention is within made, having lately been certified and filed in the office of the clerk of the Supreme Court of the United States, a copy of the stipulation of counsel is hereunto annexed and certified as the return to the writ of certiorari issued herein.

Dated, New York, November 6, 1922. [Seal of the United States Circuit Court of Appeals, Second Circuit.] Wm. Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit.

[Endorsed] United States Circuit Court of Appeals, Second Circuit. In re Charles L. Craig. Return to Certiorari.

[Endorsed:] File No. 29,038. Supreme Court U. S. October Term, 1922. Term No. 488. Charles L. Craig, Petitioner, vs. William C. Hecht, U. S. Marshal, etc. Writ of certiorari and return. Filed Nov. 10, 1922.